(1)

Supreme Court, U.S.
FILED

01-788 OCT 26 2001

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

EDWARD MAURICE COOPER,
a/k/a Hamid Abdul Wadud,
Petitioner,

v.

GOTHRIEL LAFLEUR,
Commissioner of Corrections, MN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Albert T. Goins, Sr.
Counsel of Record
Kathryn R. Burke
301 Fourth Avenue South
378 Grain Exchange Building
Minneapolis, Minnesota 55415
(612) 339-3848

Attorneys for Petitioner

2001 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

10430

QUESTIONS PRESENTED

An application for a writ of habeas corpus can be granted if the state court unreasonably applied clearly established Supreme Court precedent. The District Court clearly misapplied clearly established Supreme Court precedent when it failed to presume prejudice as required by United States v. Cronic, 466 U.S. 648 (1984) and failed to follow the requirements of Holloway v. Arkansas, 435 U.S. 475 (1978), in which a court is obligated to inquire into a potential conflict of interest and if no such inquiry is made, then prejudice is likewise presumed. The Eighth Circuit failed to recognize these misapplications of clearly established Supreme Court precedent. The questions presented are:

1. Was the deaf Appellant denied the assistance of counsel during critical stages of the proceedings, for which prejudice is presumed, where no interpreter was present for over two-thirds of all attorney-client meetings and no interpreter was present for any meeting during the investigatory period?

2. Was the Appellant denied the effective assistance of counsel, where the trial court failed to adequately inquire into a conflict of interest, and where his attorney labored under an actual conflict because his attorney's partner simultaneously represented the victim's mother, who was a witness at the trial, in an on-going divorce proceeding?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities v

Table of Appendices vii

Opinions Below 1

Statement of Jurisdiction 2

Statutory Provisions Involved 2

Statement of The Case 3

Reasons For Granting The Writ 10

I. The Eighth Circuit's Decision Effectively Denies Criminal Defendants the Unequivocal and Constitutional Right to the Assistance of Counsel 13

A. The Decisions Below Fail to Recognize that No Interpreter for Two-Thirds of All Attorney-Client Meetings is a Per Se Denial of Effective Assistance of Counsel and Therefore Prejudice is Presumed 15

1. The correct rule is that prejudice is presumed without an inquiry into the actual conduct of the attorney if the counsel's performance fell below an objective standard of reasonableness, resulting in a

proceeding which was fundamentally unfair or unreliable 18

2. The opinions below set a frightening precedent which ignores the rights of deaf and non-English speaking defendants 19

B. The Importance of this Issue Demands Certiorari Inasmuch as Public Policy Requires a Presumption of Prejudice Because the Failure to Provide an Interpreter Is a Violation of Fundamental Rights and a Denial of Effective Assistance of Counsel under the Sixth Amendment 22

II. CERTIORARI IS NECESSARY BECAUSE APPELLANT WAS DENIED THE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S IMPERMISSIBLE ACTUAL CONFLICT OF INTEREST 24

A. The Trial Court Failed to Adequately Inquire after Counsel Brought the Potential Conflict of Interest to the Court's Attention Mandating Automatic Reversal 24

B. Certiorari is Necessary Because the Courts Below Unreasonably Applied Clearly Established Supreme Court Precedent 25

C. The Trial Court Failed To Adequately Inquire Into the Nature of the Conflict of

Interest and an Improper Analysis Requires Automatic Reversal 27

D. **The State Court Made an Unreasonable Determination When It Failed to Find a Conflict of Interest** 28

Conclusion 30

TABLE OF CITED AUTHORITIES

CASES:

Cuyler v. Sullivan, 446 U.S. 335 (1980) 26, 27

Hamilton v. Ford, 969 F2d 1006 (11th Cir. 1992)..... 28

Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989)..... 19

Hario v. Reynold, 894 F.Supp. 1496 (N.D.Okla. 1995)..... 28

Holloway v. Arkansas, 435 U.S. 475 (1978)..... passim

Javor v. U.S., 724 F.2d 831 (9th Cir. 1984)..... 19

Lockhart v. Fretwell, 506 U.S. 364 (1993)..... 14

McGurk v. Stenberg, 163 F.3d 470 (8th Cir. 1998)..... 13, 19

Mickens v. Taylor, 121 S.Ct. 1651, 2001 WL 348936, **1 (U.S.)..... 12, 26

Morris v. Slappy, 461 U.S. 1 (1983) 23

Powell v. State of Alabama, 287 U.S. 45 (1932)..... 16

Selsor v. Kaiser, 22 F.2d 1029 (10th Cir. 1994)..... 25, 27, 28

Strickland v. Washington, 466 U.S. 668 (1984)..... passim

Tippins v. Walker, 77 F.2d 682 (2d Cir. 1996) 17

Tucker v. Day, 969 F.2d 155 (5th Cir. 1992) 19

United States v. Fish, 34 F.3d 488 (7th Cir. 1994)... 27, 28, 29

United States v. Mateo, 950 F.2d 44 (1st Cir. 1991)..... 19

United States v. Cronic, 446 U.S. 648 (1984) ..... passim

United States v. Cook, 45 F.3d 388 (10th Cir. 1995) 25

United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987). 17

Wheat v. U.S., 486 U.S. 153 (1988) 25, 26, 28

Wood v Georgia, 450 U.S. 261 (1981) 26, 27

STATUTES:

U.S. CONST. amend. VI 2, 16

U.S. CONST. amend. XIV, § 1 2

28 U.S.C. § 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act 3

TABLE OF APPENDICES

Eighth Circuit Order Denying Petition for Rehearing and for Rehearing En Banc, June 5, 2001 ..... A-1

Eighth Circuit Panel Opinion Affirming dismissal of Habeas Corpus Petition, April 14, 2001 .....A-2-A-3

Order On Motion For Certificate Of Appealability, May 2, 2000 .....A-4-A-6

Order Adopting the Report and Recommendation of Magistrate Judge, March 28, 2000.....A-7-A-14

Report and Recommendation of the United States District Court of the District of Minnesota, April 7, 1999 .....A-15-A-31

Minnesota Court of Appeals decision, June 10, 1997 ..... A-32-A46

Order of the Minnesota Supreme Court denying Appellant's Petition for Further Review, August 5, 1997 ..... A-47

Order of the Minnesota Court of Appeals dismissing Appellant's appeal, May 11, 1994 ..... A-48

District Court's Order and Memorandum, July 3, 1996.....A-49-A-66

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The May 11, 1994 Order of the Minnesota Court of Appeals (per Anderson, C.J. (now Minnesota Supreme Court Justice)) dismissing Appellant's appeal and remanding for postconviction proceedings (Appendix ("Pet. App.") A-48) is unpublished. The district court's order and memorandum dated July 3, 1996 (per Burke, C.J.) denying Petitioner's petition for postconviction relief (Pet. App. A-49-A-66) is unpublished. The June 10, 1997 decision of the Minnesota Court of Appeals (per Short, J.) affirming (Pet. App. A-32-A-46) is published at 565 N.W.2d 27. The August 5, 1997 order of the Minnesota Supreme Court (Keith, C.J. (now retired)) denying Appellant's petition for further review (Pet. App. A-47) is unpublished. The Report and Recommendation of the United States District Court for the District of Minnesota, dated April 7, 1999 (per Boylan, Mag.) denying petition for writ of habeas corpus (Pet. App. A-15-A-31) is unpublished. The Order Adopting the Report and Recommendation of Magistrate Judge dated March 28, 2000 (per Tunheim, J.) affirming (Pet. App. A-7-A-14) is unpublished. The Order on Motion for Certificate of Appealability dated May 2, 2000 (per Tunheim, J.) granting petitioner's motion for a Certificate of Appealability (Pet. App. A-4-A-6) is unpublished. The opinion of the United States Court of Appeals for the Eighth Circuit, filed April 14, 2001 (per Arnold, Lay, and Hansen, JJ.) affirming the dismissal of petitioner's habeas corpus claim (Pet. App. A-2-A-3) is unpublished and cited as 248 F.3d 1163. The Order Denying

Petition for Rehearing and for Rehearing En Banc dated June 5, 2001 (Pet. App. A-1) is unpublished.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its opinion and order on April, 4, 2001, and denied rehearing en banc on June 5, 2001. Justice Thomas subsequently extended the time to file this petition for a writ of certiorari to and including November 2, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The particular Amendments to the United States Constitution that are involved are set out as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

> An application for a writ of habe s corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

28 U.S.C. § 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act.

STATEMENT OF THE CASE

I. COOPER WAS CONVICTED OF CRIMINAL SEXUAL CONDUCT AND KIDNAPING.

On April 22, 1993, a 12-year old girl was abducted at knife point in Bass Creek Park, Brooklyn Park, Minnesota and was dragged into a wooded area of the park, where the assailant forced cotton gauze into her mouth and then taped her mouth shut with electrical tape. The assailant tied the victim with wire and removed her pants, proceeding to penetrate her vagina with his penis, his fingers and his tongue,

after which he removed the tape and gauze from her mouth and forced her to perform oral sex on him and to kiss him before fleeing the area.

For the above-described acts, on August 2, 1993, Cooper was convicted by a Hennepin County jury of first degree criminal sexual conduct and kidnapping.

II. WHILE THE DEAF APPELLANT'S PRIMARY LANGUAGE IS ASL AND HIS ATTORNEY'S IS ENGLISH, THERE WAS NO INTERPRETER FOR TWO-THIRDS OF ALL ATTORNEY-CLIENT MEETINGS, AND NO INTERPRETER FOR MEETINGS IN THE INVESTIGATIVE PHASE.

A. Appellant's Primary Language is American Sign Language and He Has a Limited Understanding of English.

Edward Cooper has been completely deaf since he was two and one-half years old. (P.C. Order, ¶ 4).[1] Cooper's primary language system is American Sign Language ("ASL"). (*Id.* at ¶ 13; P.C.Tr. at 174).[2] While Cooper's grasp of basic ASL is generally good, he lacks the sophistication for use of the language at higher levels. (*Id.*). Moreover, Cooper's general linguistic skills are very structured, without much flexibility. (*Id.* at 123).

ASL and English are two very different languages. (P.C. Order at ¶ 13). Cooper's knowledge of English is as a

---

[1] "Post-Conviction Order, _ __" refers to the July 3, 1996 Order, Finding of Fact No. 4. (Appendix p. A-50).

[2] "P.C.Tr." refers to the transcript of the post-conviction relief hearing, held on January 25, 1996 and April 17, 1996, and "P.C.Tr. Ex. ___" refers to the exhibits from the post-conviction relief hearing. "Tr.Tr." refers to the transcript of the trial, held on July 29, 30 and August 2, 1993.

"second language" and is rudimentary -- he does not have a full understanding of, and has difficulty with, for example, multiple meanings of words, figurative language, or a command of the syntax of English and its subtleties. (*Id.* at 117). Cooper learned English through a cumbersome and inexact memorization technique previously taught in deaf schools. (P.C.Tr. at 116-18, 121). While Cooper may read some English, it is at a limited level involving only ritualistic phrases and simple syntax. (*Id.* at 120). Although relatively intelligent, Cooper only reads at approximately the third grade level, (P.C. Order at ¶ 13), and would have difficulty, for instance, reading a newspaper without visuals. (P.C.Tr. at 137).[3] If presented with police reports or legal documents that did not have visual aids in them, Cooper would have difficulty understanding them and could mix up the content. (*Id.* at 138). Because of Cooper's limited understanding of the multiple meanings of words, figures of speech, language structure and other conventions of English, it is unlikely that he could truly understand an English-speaking person without an ASL interpreter. (*Id.*).

B. Appellant's Attorney's Primary Method of Communication was "Passing the Pad," Using Shorthand English Notes with Abbreviations But No Sentence Structure.

David T. Redburn, Cooper's trial attorney, did not speak ASL, and had no experience with deaf individuals, personally or legally. (*Id.* at 90-91.). However, trial counsel's lack of experience did not trouble him, (*id.*), and, therefore, only three of the pre-trial meetings between Cooper and trial

[3] High cognitive ability does not mean that a non-English speaking person will comprehend English if the language skills are not developed. (*Id.* at 138-39).

counsel -- May 3, July 16 and July 20 -- were held with a qualified interpreter. (P.C. Order at ¶ 10; P.C.Tr. at 47, 101 and P.C.Tr.Ex. 6).

In meetings without an interpreter, trial counsel attempted to "communicate" with Cooper only by "passing the pad," that is, by writing shorthand English language notes on a legal pad. (*Id.* at 9; P.C.Tr. at 40-41, 48-49, 77-79). However, trial counsel did not use any sentence structure in the notes, and he used abbreviations of "common" words that he assumed were known by both. (*Id.* at 98). Trial counsel knew that he could not write as fast as he could speak. (*Id.* at 81).[4] Nevertheless, trial counsel discussed substantive matters relevant to Cooper's defense at the meetings, (*id.* at 47, 77), although he found it extremely difficult to "get across" to Cooper without an interpreter. (P.C. Order at ¶ 12). On those few occasions with an interpreter, trial counsel found that it was much easier to talk with Cooper. (*Id.*). While trial counsel claimed to go over concepts that he (not Cooper) believed that Cooper did not understand from the meetings without an interpreter, (P.C.Tr. at 81-84), he intentionally did not retain the vast majority of the pads from those meetings; therefore he could not be sure whether he covered with an interpreter the concepts which he (not Cooper) thought Cooper did not understand with no interpreter. (*Id.* at 99).

On April 23, the day of his arrest, Cooper and trial counsel met for approximately 15 minutes without an interpreter. (*Id.* at 40). The police told trial counsel that, because of a conflict of interest, he could not use their interpreter, and offered him a chance to call for an interpreter before the investigative interview began, but trial counsel said that he did not need one. (*Id.* at 49-50; P.C.Tr.Ex. 9 at ¶ 2).

---

[4] In fact, writing takes nearly ten times as long as speaking. (*Id.* at 125-26).

Thus, prior to Cooper's initial interview with the police, trial counsel only could "communicate" with Cooper for 15 minutes, at most, of "passing the pad."

On April 26, the day before Cooper's first appearance, trial counsel briefly met with him again without an interpreter. (P.C. Order at ¶ 10; P.C.Tr. at 45; P.C.Tr. Ex. 7 at ¶ 2, Ex. B). On May 3, Cooper and trial counsel met for the first time with an interpreter, but the meeting only lasted 75 minutes. (P.C. Order at ¶ 10; P.C.Tr. at 44, 46-47 and P.C.Tr. Ex. 6).[5] On July 16, two and one-half months later and only 10 days before the omnibus hearing, Cooper and trial counsel finally met for the second time with an interpreter, but for no more than two hours. (P.C. Order at ¶ 10; P.C.Tr. at 47, 101 and P.C.Tr.Ex. 6).

From the arrest until 10 days before the omnibus hearing, Cooper and trial counsel met at least seven times, but an interpreter was present for at most 75 minutes during the entire time. For the two and one-half months during which trial counsel should have been conducting a pretrial investigation -- May 3 to July 16 -- Cooper and trial counsel only "passed the pad," but never met with an interpreter. (P.C. Order at ¶ 10; P.C.Tr. Ex. 7 at ¶ 2, Exs. B, E).

On July 20, six days before the omnibus hearing, Cooper and trial counsel met for the third time with an interpreter, but for only two hours. (P.C. Order at ¶ 10; P.C.Tr. at 101 and P.C.Tr. Exhibit 6). On July 24, Cooper and trial counsel met for the last time before the July 24 omnibus hearing but, again, without an interpreter. (P.C. Order at ¶ 10; P.C.Tr. Ex. 7 at ¶ 2, Ex. E).

---

[5] Meetings between an attorney and a deaf client with an interpreter take at least twice as long as meetings with a hearing client. (P.C.Tr. at 145-46). Thus, a one hour meeting with an interpreter is the equivalent of no more than a one-half hour meeting with a hearing client.

Cooper and trial counsel did not meet again, with or without an interpreter, until August 1, the night before the last day of trial. (P.C. Order at ¶ 10; P.C.Tr.Exs. 6 and 7).

On August 11, after the jury verdict and only days before post-trial motion papers were due, Cooper and trial counsel met one more time but, again, without an interpreter. (P.C. Order at ¶ 10; P.C.Tr. Ex. 6, ¶ 2 at Ex. D).

III. Appellant's Attorney's Law Firm Represented the Victim's Mother at the Same Time That it Represented Appellant.

The victim's mother was the state's first witness. (Tr.Tr. at 26-28). Not present for the opening statements, she was brought into the courtroom when it was time to testify. (P.C.Tr. at 215-16). When defense counsel saw her, he recognized her as a client of his three-attorney law firm, (P.C.Tr. at 30), asked for a side-bar, after which the judge held an in-chambers meeting with trial counsel and the prosecutor, but without Cooper. (Tr.Tr. at 26-27, P.C.Tr. at 25). The court only engaged in the following brief colloquy with the attorneys before deciding that there was no conflict of interest:

> THE COURT: We are on the record. We are in chambers, out of the hearing of the jury, and the defendant is not present. We can make a record in the courtroom with the defendant present, but Counsel wanted to come back to chambers to alert me to a potential problem. Mr. Redburn.
>
> MR. REDBURN: The problem, Your Honor, is that apparently one of my partners has represented [name omitted], the victim's, in this case, mother, he represented her in a divorce action.

MR. APPLEBY: That's what the victim's mother informed me Your Honor, a divorce action. She told me it was three or maybe more years ago that the divorce was completed.

MR. REDBURN: One of my partners apparently represented the victim's mother in a divorce action approximately three years ago but the action has been complete.

THE COURT: Does anyone see any potential conflict here?

MR. APPLEBY: The State does not, Your Honor.

MR. REDBURN: I do not, no. I wanted to just bring it to the Court's attention.

(Tr.Tr. at 27-28).

The court never made a record with Cooper present. (*Id.*). As important as it was, the information provided and upon which the court based its decision was false.

In actuality, the firm began representing the mother in mid-March 1993, and the mother visited trial counsel's office two or three more times before the divorce hearing on May 17. (P.C.Tr. at 5, 9, 25, 109). The mother met trial counsel in his office when attending those meetings. (*Id.* at 11). The divorce decree, entered on May 21, (P.C.Tr.Ex. 4), mandated that the representation would continue for 91 days. (*Id.*). On June 4, trial counsel acknowledged his partner's signature on service papers for the divorce. (P.C.Tr.Ex. 5). In a small office, the partners shared fees, (P.C.Tr. at 75, 107), and the client files were kept in a common area of the office, accessible to each attorney. (*Id.* at p. 28, 112). The attorneys

helped one another on their respective cases. In particular, trial counsel's partner asked him for legal advice on serving papers on the husband of the victim's mother. (*Id.* at 27-28). Similarly, trial counsel consulted with his partner on the Cooper case. (*Id.* at 70, 94-95; 108).

Despite going along with the State's apparent misrepresentation that the divorce had concluded over three years earlier, trial counsel knew that he had talked with the mother in the firm's new offices which they had moved into, at most, only one year earlier. (*Id.* at 34-35). At the first break after the in-chambers meeting, trial counsel called his partner to refresh his recollection on the details of the representation, and then talked with him further that evening. (*Id.* at 36-38). However, trial counsel never advised the court what he found out. (*Id.* at 71-72). Additionally, trial counsel never advised Cooper about the conflict. (*Id.* at 71).

PROCEDURAL POSTURE

Cooper sought habeas corpus relief vacating his conviction and/or granting a new trial. The Eighth Circuit Panel, in an unpublished opinion, affirmed the District Court's dismissal of Cooper's habeas corpus claim. Cooper sought rehearing en banc, which was denied in an opinion dated June 5, 2001.

Cooper is now petitioning this Honorable Court for a writ of certiorari based on the Eighth Circuit's departure from the accepted and usual course of judicial proceedings. These issues involved in this case demand this Court to exercise its supervisory powers.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, the Eighth Circuit Court of Appeals affirmed the habeas corpus

ruling by the District Court of Minnesota in which the District Court erroneously found the State court properly applied clearly established Supreme Court precedent when it determined that the failure to provide an American Sign Language interpreter was simply an attorney error and not a presumption of ineffectiveness of counsel. The Minnesota state court erroneously applied the test set out in Strickland v. Washington, 466 U.S. 668 (1984), which involves strategic attorney errors. However, Strickland is not the proper test to apply in the case at bar, rather, the court should have applied the test set out by this Court in United States v. Cronic, 446 U.S. 648 (1984). Cronic provides that prejudice need not be proven under circumstances which "strongly suggest [the] abridgment of the right to effective assistance that prejudice is presumed." See United States v. Cronic, 446 U.S. 648 (1984).

Counsel's failure to provide an ASL interpreter requires the analysis of United States v. Cronic, 466 U.S. 648 (1984), however the state court unreasonably applied Strickland v. Washington, 466 U.S. 668 (1984) and interpreted counsel's error as tactical or strategic, therefore requiring Mr. Cooper to prove that the outcome of the trial would be different but for counsel's error. At the Eighth Circuit, Petitioner needed to prove that the state court unreasonably applied clearly established Supreme Court precedent. Petitioner stresses to this distinguished Court that the issue of ineffective assistance of counsel based on the failure to provide an ASL interpreter is of such exceptional importance that the failure to grant certiorari puts the lid on a widespread problem in the criminal justice system. There is no other precedent to assist deaf individuals in their fight for equal rights and adequate representation. All too frequently, deaf individuals are confused with those who can speak English. There is a common failure to understand that ASL is a foreign language, nothing like English. This issue is of exceptional importance and requires this Court to clarify the clearly established

precedent and clearly detail the reasons the state court's application of Strickland is unreasonable.

Second, the Eighth Circuit again affirmed the state court's ruling in which the court failed to recognize that Holloway v. Arkansas, 435 U.S. 475 (1978) requires an inquiry into a potential conflict of interest. The trial court failed to make any sort of inquiry into the potential and apparent conflict of interest. Under Holloway, prejudice is presumed and reversal is automatic in such a case as Mr. Cooper's when the court fails to make an adequate, or any, inquiry into the potential conflict.

The second issue is perhaps even more exceptionally important due to the fact that the United States Supreme Court has recently granted Certiorari to decide whether a criminal defendant must show an actual conflict of interest and an adverse impact in order to establish a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it reasonably should have known. See Mickens v. Taylor, 2001 WL 348936 (U.S.). This is the same issue that Petitioner has brought to this Court, however, Petitioner's case requires further clarification as to what constitutes an adequate inquiry.

Specifically, Petitioner argues that the trial court failed to inquire into a potential conflict of interest despite trial counsel's notification to the court of the possibility of a conflict due to the fact that his law office, which was composed of two attorneys at that time, was representing the victim's mother in a divorce at the same time of counsel's representation of the defendant. The prosecuting attorney made the representation that the divorce proceeding had ended three years prior and no dispute was made regarding this time frame, however, it was in fact incorrect. The trial court responded by asking one question: "Does anyone see any potential conflict here?" This is equivalent to **no inquiry**

at all, and therefore Holloway v. Arkansas, 435 U.S. 475 (1978) requires an automatic reversal.

I. The Eighth Circuit's Decision Effectively Denies Criminal Defendants the Unequivocal and Constitutional Right to the Assistance of Counsel.

The Eighth Circuit has held "[w]e review questions of ineffective assistance of counsel based on an undisputed factual record de novo." See McGurk v. Stenberg, 163 F.3d 470, 473 (8th Cir. 1998). Further "'[i]n a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d).'" See id. (quoting Strickland v. Washington, 466 U.S. 668, 698 (1984)). The state court which adjudicated Appellant's claims failed to reasonably apply the clearly established constitutional precedent applicable to the constructive or actual denial of counsel to Cooper, given the cardinal nature of the constitutional principle embodied by the Sixth Amendment.

The Eighth Circuit failed to even review the state court's analysis, therefore, the Eighth Circuit's failure to assure the proper constitutional standard essentially requires defendants to prove that they have been adversely affected and prejudiced when they have been denied their right to the assistance of counsel. While the state court recognized that if surrounding circumstances justify a presumption of ineffectiveness, it need not inquire into counsel's actual performance at trial, the state court failed to properly apply Cronic. See United States v. Cronic, 466 U.S. 648, 662 (1984). Cronic states that prejudice need not be proven under circumstances which,

> although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

See id. at 659-60. "In some cases, the circumstances surrounding a defendant's representation so strongly suggest abridgment of the right to effective assistance that prejudice is presumed." See Lockhart v. Fretwell, 506 U.S. 364, 378 (1993). That is the case here. However, the state courts misapplied this principle.

Cronic states that prejudice need not be proven under circumstances which "strongly suggest abridgment of the right to effective assistance that prejudice is presumed." See United States v. Cronic, 446 U.S. 648 (1984).

Mr. Cooper's trial counsel's failure to provide an interpreter was not a part of a grand strategy to win the case. His failure to provide an interpreter was a "professional error," **not** a ***strategic error*** as considered by Strickland. This professional error automatically places this matter in the realm of Cronic where prejudice is presumed because the effect of such an error is the same as constructively denying the assistance of counsel.

Cooper and his attorney did not speak the same language and, without an interpreter, no effective communications occurred between them. Subsequent meetings could not cure the deficiency of the earlier meetings. As a result, Cooper's trial counsel could not assist Cooper in any meaningful way -- it was no different than if the court forbade Cooper and his attorney from meeting, or if Cooper's attorney simply chose to sit silently or was absent. Cooper was denied the assistance of counsel during a critical stage of the proceedings, which is legally presumed to result in prejudice.

Cooper is entitled to a new trial, with lawyering -- actual lawyering -- in order to justify reliance on the outcome.

The state court's application of established law was unreasonable because state and federal statutes and case law, as well as professional standards, are unequivocal: The rights of the hearing-impaired cannot be adequately protected without qualified interpreters to assist them in their own defense. The hearing-impaired are entitled to communicate as effectively with their attorneys as are hearing persons. Thus any failure to meet these standards is definitionally a presumptive denial of counsel.

The Eighth Circuit's decision to simply affirm the dismissal of the habeas corpus claim and not consider this denial of assistance of counsel under the Cronic standards, set a frightening precedent. For those defendants who are not fluent in English, or who do not speak English at all, face impending doom when they meet with their English speaking attorney and are not provided an interpreter in order to facilitate communication. If a defendant can not communicate with his/her attorney, it is virtually impossible for that attorney to discover the true facts surrounding the allegations, the possible defenses, and all other pertinent information that an attorney requires when representing a criminal defendant.

A. The Decisions Below Fail to Recognize that No Interpreter for Two-Thirds of All Attorney-Client Meetings is a Per Se Denial of Effective Assistance of Counsel and Therefore Prejudice is Presumed.

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of

Counsel for his defence." U.S. CONST. amend. VI. As Justice Sutherland explained,

> [e]ven the intelligent and educated layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

See Powell v. State of Alabama, 287 U.S. 45, 68-69 (1932)(emphasis added). Thus, the Sixth Amendment's right to the effective assistance of counsel "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." See United States v. Cronic, 466 U.S. 648, 658 (1984). In other words, "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." See Strickland v. Washington, 466 U.S. 668, 691-92 (1984).

Further, the right to counsel is the right to the *effective* assistance to counsel. See id. at 686. The mere physical presence of an attorney does not fulfill the Sixth Amendment's guarantee when the "advocate's lips" are "effectively sealed" on crucial matters. See Holloway v. Arkansas, 435 U.S. 475, 488 (1978). A defendant is entitled to assistance by an attorney "who plays the role necessary to ensure that the trial is fair." See Strickland, 466 U.S. at 667. Cooper's lawyer could not play that role *sans* interpreter.

In this matter, an interpreter was not present for two-thirds of all pre-trial meetings between the deaf Cooper and his attorney, and no interpreter for *any* meeting from May 3 to July 16, 1993, only ten days before trial.

For the numerous meetings without an interpreter at which substantive issues were nevertheless raised, there is no way to measure how much, if any, Cooper understood trial counsel; how much, if any, trial counsel understood Cooper; or how much, if any, that which each of them thought he understood was, in fact, accurate. Without an interpreter, trial counsel was little more than a potted plant during a critical stage of the proceedings. Likewise, "sleeping counsel is tantamount to no counsel at all." See Tippins v. Walker, 77 F.3d 682, 685 (2nd Cir. 1996) (quoting United States v. DiTommaso, 817 F.2d 201, 216 (2d Cir. 1987)). Cooper's expert, Dr. Susan Rose, succinctly summarized the communications between Cooper and trial counsel as void: ***we just don't know; we can't judge the situation; we weren't there; we just don't know***. Moreover, subsequent meetings with an interpreter provided no assurance of filling the void -- as even the State's expert testified, ***if neither person is aware that a misunderstanding occurred, there is no opportunity for correction.***

Put very simply, the issue is whether no interpreter at two-thirds of all pre-trial meetings, during which counsel nevertheless thought he could communicate on substantive matters, constructively denied Cooper the assistance of counsel. It becomes very dangerous to assume that the failure to provide an interpreter at pre-trial meetings would have no effect on the outcome of the proceedings. Such an assumption comes frighteningly close to stating that the only meaningful proceedings are those which occur in the courtroom. Additionally, such an assumption would effectively limit the right to the assistance of counsel by rationalizing that communication at pre-trial proceedings is

not essential, and therefore erroneously concluding that whether or not the attorney and client can effectively and successfully communicate, the proceedings would therefore be unaffected.

1. The correct rule is that prejudice is presumed without an inquiry into the actual conduct of the attorney if the counsel's performance fell below an objective standard of reasonableness, resulting in a proceeding which was fundamentally unfair or unreliable.

Two lines of authority govern Sixth Amendment assistance of counsel claims. In the typical case, a defendant is denied his right to the assistance of counsel by the actual ineffective assistance of counsel. See Strickland, 466 U.S. at 692. To prevail, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for the professional legal errors, the result of the proceeding would have changed -- the defendant must prove prejudice. See id. This is the bad lawyering standard.

However, a defendant may also be denied his right to counsel where the assistance of counsel was actually or constructively denied -- that is, no lawyering. See id.; Cronic, 466 U.S. at 659. This second scenario applies to Appellant's case. Thus, actual ineffective assistance, bad lawyering, if treated as separate and distinct from actual or constructive denial of assistance, no lawyering -- the latter " *is legally presumed to result in prejudice.*" See Strickland, 466 U.S. at 692 (emphasis added).

In articulating the prejudice component of the Strickland analysis, the Supreme Court provided that in certain circumstances the requisite showing of prejudice may be

presumed due to the nature of the deficient performance. See McGurk v. Stenberg, 163 F.3d 470, 473 (8th Cir. 1998); see also Strickland, 466 U.S. at 692 ("In certain Sixth Amendment contexts, prejudice is presumed."). For the most part, courts have presumed prejudice only where the defendant establishes a constructive denial of counsel. See McGurk, 163 F.3d 470, 474 citing, Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (counsel remained silent through resentencing hearing); United States v. Mateo, 950 F.2d 44, 48-50 (1st Cir. 1991) (same throughout trial despite absence of waiver); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (failure to object to directed verdict by trial court); Javor v. U.S., 724 F.2d 831, 833 (9th Cir. 1984) (attorney slept through portion of trial). Finally, the Eighth Circuit most recently in McGurk justified a presumption of prejudice when counsel failed to inform defendant of his right to a jury trial. See McGurk, 163 F.3d 470, 474 (8th Cir. 1998).

2. The opinions below set a frightening precedent which ignores the rights of deaf and non-English speaking defendants.

The decisions below unreasonably applied clearly established Supreme Court precedent when the courts determined the failure to provide an ASL interpreter was simply an attorney error and not a presumption of ineffectiveness of counsel. The District Court decided that this was a case of bad lawyering, that failing to provide an interpreter for two-thirds of all attorney-client meetings was only a tactical or strategic blunder. Applying the second prong of Strickland, the court then found that Cooper failed to show how the outcome of the trial would have changed.

However, Strickland's second prong does not apply here, because Cooper could get no representation from Trial counsel, shoddy or not, without an interpreter. Cooper was

denied the assistance of counsel, as surely as if the court refused Cooper access to Trial counsel or as if Trial counsel simply did not talk to Cooper. Thus, prejudice must be presumed. Accordingly, the state and District court unreasonably applied clearly established Supreme Court precedent when they applied the second prong of Strickland to determine whether the result would have been different but for the attorney error.

Strickland clearly discusses three possibilities: 1) prejudice is presumed; 2) ineffectiveness of counsel due to an actual conflict of interest; and 3) ineffectiveness claims based on deficiency of attorney's performance where defendant must also show that the errors affected the outcome of the proceeding. See Strickland, 466 U.S. 692-694 (1984). Clearly, considering the facts of the case, the appropriate conclusion is that prejudice is presumed, thus there is no need for Cooper to show that the outcome of the proceeding was affected by an attorney "error."

Strickland's two-prong standard focuses on an attorney's professional judgment, his choice of legal tactics and strategies. A court reviews the attorney's actual performance in the proceedings, his use of the wide range of *reasonable* professional tactics and strategies available in the defense of his client. However, having no interpreter at attorney-client meetings is not a legal tactic or strategy. It is a denial of counsel, as real as if a court prevented any meetings at all or if an attorney chose not to meet or talk with his client.[6] It is counsel permitting herself to be both gagged and blindfolded by her misconceptions.

Moreover, the quality of attorney-client communications is a critical tool to a proper assessment of any legal tactics or

---

[6] Cooper raised constructive denial of the assistance of counsel both at the sentencing and post-conviction hearing. See Transcript of Sentencing Hearing at pp. 30-46; P.C.Tr. at pp. 56-67.

strategies employed (or not employed) by the attorney. Strickland v. Washington, 466 U.S. 668, 691 (1984). However, without an interpreter, no effective communication could occur, meaning that a predicate tool needed to assess Trial counsel's performance is unavailable.

No effective attorney-client communications occurred during a critical stage of the proceedings, and subsequent communications with an interpreter were adversely affected as a result. Trial counsel could not offer any assistance which could be evaluated as effective or ineffective. Trial counsel was rendered the functional equivalent of a potted plant. Having no interpretive services at attorney-client meetings was not a tactical, legal judgment to be measured by its reasonableness under the Strickland two-prong standard -- it was not a *trial strategy error* but a *structural error*. That is, the absence of interpretive services was not a reasonable choice from among varied alternatives of defense tactics -- it was an actual failure to provide a defense by Cooper's counsel.

Trial counsel's "error" poisoned the entire proceeding in that he did not and could not communicate with Cooper to discover any information to use as a defense in Cooper's trial. There is no other way – in fact, no way – to calculate the harm caused by this failure. Because there is no way to quantify the amount of prejudice resulting from this error, Cronic, not Strickland, clearly applies in this matter and, therefore, prejudice must be presumed. The state court's failure requires habeas relief.

B. The Importance of this Issue Demands Certiorari Inasmuch as Public Policy Requires a Presumption of Prejudice Because the Failure to Provide an Interpreter Is a Violation of Fundamental Rights and a Denial of Effective Assistance of Counsel under the Sixth Amendment.

The A.B.A. Standards for the Defense Function and Standards for Criminal Justice, the Americans With Disabilities Act, the Minnesota Human Rights Act, Minnesota statutes mandating interpretive services and other Minnesota and Federal statutes make it clear that qualified interpreters are necessary to ensure that the rights of hearing-impaired individuals are protected. Public policy thus creates a presumption that no effective communication takes place between a hearing-impaired person and a hearing person absent an interpreter.

The common misconception is that American Sign Language is simply a method to interpret English to deaf people. This is untrue. American Sign Language itself is a foreign language. Simply because a deaf person uses American Sign Language does not mean they understand or are fluent in English.

Cooper proved that he is deaf and that no interpreter attended two-thirds of all attorney client meetings, even though substantive matters were raised at the meetings without an interpreter. Having met that burden, Cooper should not be required to engage in attempting to prove how much, if any, he understood trial counsel, how much, if any, trial counsel understood him, and how much, if any, that which each of them believed he understood was, in fact, correctly understood. The right to the assistance of counsel is too fundamental to require Cooper to indulge in such "nice calculations" of prejudice.

Without an interpreter, Cooper and trial counsel could not communicate effectively about substantive issues. Subsequent meetings could not fill the void. As a result, Cooper was denied the assistance of counsel as surely as if the court forbade attorney-client meetings or if trial counsel refused to meet or speak to Cooper – trial counsel essentially became a "silent potted plant."

The importance of meaningful communication between an attorney and client cannot be underestimated. Justice Brennan's words are most applicable here. He wrote in a concurring opinion that "[i]t is the defendant's interests, and freedom, which are at stake. Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy. . . Moreover, counsel is likely to have to make a number or crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. These decisions can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence." See Morris v. Slappy, 461 U.S. 1, 21 (1983) (Brennan, J. concurring).

This Court should grant Certiorari due to the extreme importance of this issue. Deaf criminal defendants are not uncommon and they should have the same guarantee of effective assistance of counsel as the rest of us. It is clear that the lower courts unreasonably applied clearly established Supreme Court precedent. Allowing the decisions to stand creates a new silent precedent, the magnitude of which we cannot at this time perhaps imagine. It could result in the elimination of court appointed interpreters for indigent criminal defendants. Courts have created systems to provide foreign language interpreters so defendants are guaranteed the effective assistance of counsel and are aware of the

proceedings around them. Deaf individuals should be provided no less.

II. CERTIORARI IS NECESSARY BECAUSE APPELLANT WAS DENIED THE ASSISTANCE OF COUNSEL DUE TO HIS ATTORNEY'S IMPERMISSIBLE ACTUAL CONFLICT OF INTEREST.

A. The Trial Court Failed to Adequately Inquire after Counsel Brought the Potential Conflict of Interest to the Court's Attention Mandating Automatic Reversal.

Under the Holloway line of authority, where the trial court knows about the possibility of a conflict but fails to make adequate inquiry into it, prejudice is presumed and automatic reversal is mandated. See Holloway v. Arkansas, 435 U.S. 475, 478-92 (1978). In this matter, the trial court was made aware of the conflict of interest. Thus, the issue is whether the trial court made an adequate inquiry into the conflict. Because the court did not do so, prejudice is presumed and reversal automatic.

From before trial counsel's first meeting with Cooper through the end of trial, *trial counsel's three-attorney law firm represented the victim's mother in a divorce action.* This conflict of interest should have precluded trial counsel from representing Cooper, or minimally, required him to obtain Cooper's (and the mother's) consent to continue after trial counsel made full disclosure of the conflict and its consequences.

When the trial court became aware of the conflict of interest, it failed to adequately investigate. The court merely engaged in a brief colloquy with the attorneys **without Cooper present**. Based upon a misrepresentation that the

divorce concluded three years ago, the court found no conflict of interest and continued with the trial. However, the court's analysis was incorrect and incomplete, even assuming that the misrepresented facts were true. Moreover, although the court acknowledged that it should advise Cooper on the record, **it never did so.** Thus the mother was "cross-examined" by trial counsel, her own attorney's partner, while Cooper was none the wiser. It was not until the actual day of his sentencing that Cooper learned about the conflict of interest; however, his counsel never disclosed this fact directly to Cooper. Cooper learned about it from his family; when it was too late.

The trial court failed to adequately investigate the conflict of interest. Following its inadequate inquiry into the conflict, the court failed to inform Cooper of his attorney's conflict with the victim's mother. Most deplorable is that Cooper was not even given the opportunity to object to the fact that his trial attorney was about to continue representing him under an actual conflict of interest which most certainly inured to Cooper's detriment.

B. Certiorari is Necessary Because the Courts Below Unreasonably Applied Clearly Established Supreme Court Precedent.

Holloway v. Arkansas, 435 U.S. 475 (1978), and its progeny govern this issue. Under the Holloway line of authority, where the trial court knows about the possibility of a conflict of interest but fails to make adequate inquiry into it, prejudice is presumed and automatic reversal is mandated. See id. at 487-91; see also Selsor v. Kaiser, 22 F.3d 1029, 1033 (10th Cir. 1994). This right to conflict free representation "is not limited to cases involving joint representation of co-defendants . . . but extends to any situation in which a defendant's counsel owes conflicting duties to that defendant and some other third person." See

Wheat v. U.S., 486 U.S. 153 (1988); United States v. Cook, 45 F.3d 388, 393 (10th Cir. 1995).

This Court also stated in Wood v. Georgia, that to protect a defendant's right to conflict-free counsel, a trial court must initiate an inquiry when it knows or reasonably should know of the possibility of a conflict of interest. See Wood, 450 U.S. at 272, and n.18; see also Wheat v. U.S., 486 U.S. 153, 160 (1988); Cuyler v. Sullivan, 446 U.S. 335, 347 (1980). This Court has been clear, "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." See Wood, 450 U.S. at 271; e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978).

In this matter, the trial court was made aware of the conflict of interest. Thus, the lower courts should have determined that the trial court failed to make an adequate inquiry into the conflict. Because the decisions below were incorrect, and because further clarification is needed regarding the issue of a court's duty to inquire into a potential conflict, the Court should grant certiorari to decide and clarify this very important issue. Further, although this Court decided to hear the case of Mickens v. Taylor, _____ U.S. (2001), the issue here focuses directly on the inquiry itself, not whether the defendant needs to prove the conflict and that this conflict adversely affected the attorney's performance when a court fails to inquire.

Here, the trial court was made aware of the potential conflict of interest. In such a case as Cooper's, where the court is made aware of the potential and probable conflict of interest, that court has a duty to meaningfully inquire. The issue here is whether the inquiry was adequate. Appellant argues that asking one question of counsel does not qualify as an adequate inquiry, particularly when the discussion occurred without the knowledge of the defendant. The in-

chambers discussion can in no way be defined as an inquiry into the potential conflict. In such a case prejudice is presumed and reversal automatic. Accordingly, Certiorari is more than warranted in this situation, it is necessary in order to right the numerous wrongs this Petitioner has been forced to suffer.

C. The Trial Court Failed To Adequately Inquire Into the Nature of the Conflict of Interest and an Improper Analysis Requires Automatic Reversal.

The right to effective assistance of counsel encompasses "a correlative right to representation that is free from conflicts of interest." See Wood v. Georgia, 450 U.S. 261, 271 (1981) (citing Cuyler v. Sullivan, 446 U.S. 335 (1980) and Holloway v. Arkansas, 435 U.S. 475, 484 (1978)).

Two lines of Supreme Court authority govern conflict of interest claims. In the first, when a defendant fails to make a timely conflict objection to the court, then prejudice may be presumed, but "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" See Strickland v. Washington, 466 U.S. 668, 692 (1984) (quoting Sullivan, 446 U.S. at 350, 348).

In contrast, when the defendant, or defendant's counsel, makes a timely conflict of interest objection or the trial court otherwise knows or should reasonably know of the possibility of a conflict, and the court fails to adequately inquire into the conflict, a defendant demonstrates ineffective assistance of counsel without showing an actual conflict of interest. See Holloway, 435 U.S. at 487-91; Selsor v. Kaiser, 22 F.3d 1029, 1033 (10th Cir. 1994); United States v. Fish, 34 F.3d 488, 492 (7th Cir. 1994).

Thus, when a court becomes aware of even the possibility of a conflict, it must make adequate inquiry *sua*

sponte. See Hamilton v. Ford, 969 F.2d 1006, 1011-12 (11th Cir. 1992); Selsor, 22 F.3d at 1033; Fish, 34 F.3d at 492. This is because the court has an "independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment." See Wheat v. U.S., 486 U.S. 153, 161 (1988). If a court fails to take adequate steps to investigate the conflict, prejudice is presumed -- automatic reversal is mandated. See Holloway, 435 U.S. at 489-91; Selsor, 22 F.3d at 1033; Fish, 34 F.3d at 492; Hamilton, 969 F.2d at 1011-12.

To explore adequately the risk of a conflict of interest, a court must examine the facts and details to determine if they compromise the adequacy of the defense. See Selsor v. Kaiser, 81 F.3d 1492, 1503-04 (10th Cir. 1996); Fish, 34 F.3d at 493. Moreover, an inquiry consisting solely of comments in a colloquy is insufficient -- the court's inquiry must be searching. See Hamilton, 969 F.2d at 1012. A court must attempt to independently verify the extent of the conflict. See Harjo v. Reynolds, 894 F. Supp. 1496, 1502 (N.D.Okla. 1995).

D. The State Court Made an Unreasonable Determination When It Failed to Find a Conflict of Interest.

The state court unreasonably determined that the trial court fulfilled its obligation to ascertain whether an impermissible conflict existed. The trial court simply asked **one question**. That one question was simply "does anyone see any potential conflict here?" This single question cannot reasonably be considered an "investigation" or even an "inquiry," based on clearly-established precedent.

At the in-chambers colloquy, the trial attorneys made two statements of "fact" about the conflict to the court: (1) that trial counsel's partner represented the victim's mother in a

divorce, and (2) that the representation ended three years ago. Based only on this *inaccurate* information, the trial court then asked a single, conclusory question: "Does anyone see any potential conflict here?" This was no inquiry at all.

Assuming that the divorce proceeding ended three years earlier (which it had not), the court had a minimal obligation to determine the degree to which the Minnesota Rules of Professional Conduct and Cooper's constitutional rights were implicated. However, the trial court did not do so and, instead, merely relied on trial counsel's assessment of the conflict.

While a court can rely, in part, on counsel's assessment of the potential for conflict, that reliance must be reasonable. See United States v. Fish, 34 F.3d 488, 493 (7th Cir. 1994). However, in this matter, the trial court did not try to discover the basis of trial counsel's assessment in order to then determine the reasonableness of that assessment. For instance, if the court had asked trial counsel when he learned of the conflict, the court would have realized that the reasonableness of trial counsel's assessment was not the result of any meaningful analysis but was developed in the few moments walking from the courtroom into chambers.[7] In contrast, in Fish, counsel's assessment of the conflict was set forth in briefs, affidavits and hearing testimony for a motion to disqualify. See id. at 492. Likewise, in Holloway, the evidence of the conflict was presented to the trial court in multiple pre-trial motions focusing explicitly on the conflict of interest. See Holloway v. Arkansas, 435 U.S. 475 (1978). Here, the trial court had no basis upon which to determine

[7] Trial counsel, two years out of school, new to major criminal trials, in a case involving a deaf client and interpreters, on the first morning, was taken by surprise by the State's first witness, his firm's client, and he simply could not effectively analyze a conflict issue in the very brief but pressure-laden in-chambers conference.

that trial counsel made a reasonable, well thought-out assessment of the conflict. As a result, the court could place no reasonable reliance upon trial counsel's assessment.

CONCLUSION

The Petitioner's Writ of Habeas Corpus should be granted based on the unreasonable applications of Supreme Court precedent. Both issues before this Court are of such substantial importance not only for this Petitioner but for all non-English speaking individuals and for all those whose voices are quieted in the criminal justice system. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

Dated: October 26, 2001

GOINS & WOOD, P.C.

Albert T. Goins, Sr.
Counsel of Record
Kathryn R. Burke
301 Fourth Avenue South
378 Grain Exchange Building
Minneapolis, Minnesota 55415
Telephone: 612-339-3848
Facsimile: 612-339-3853

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 00-2372

Edward Maurice Cooper, etc.,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for
	*	Rehearing En Banc
Gothriel J. LaFleur, etc.,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

June 5, 2001

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2372

Edward Maurice Cooper, also known as Hamid Abdul Wadud,	*	
Petitioner-Appellant,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Gothriel J. LaFleur, Commissioner of Corrections, MN,	*	(UNPUBLISHED)
Respondent-Appellee.	*	

Submitted: February 14, 2001

Filed: April 4, 2001

Before RICHARD S. ARNOLD, LAY, and HANSEN, Circuit Judges.

PER CURIAM.

Edward Cooper was convicted of kidnaping and sexually assaulting a twelve-year-old girl. Cooper has been deaf since childhood. His primary language is American Sign Language

(ASL), although he has a rudimentary knowledge of English. Cooper alleges that his attorney, David Redburn, provided ineffective assistance of counsel for two reasons. First, Redburn, who had no experience with deaf individuals, only had an ASL interpreter present for three pre-trial meetings. These meetings constituted approximately one-third of the total pre-trial meetings. Second, Cooper argues that Redburn had a conflict of interest because the Government's first witness--the victim's mother--was represented in a divorce by one of Redburn's legal partners.

Cooper's petition for post-conviction relief was denied by the Minnesota courts. See Cooper v. State, 565 N.W.2d 27 (Minn. Ct. App. 1997). Cooper then sought a writ of habeas corpus under 28 U.S.C. § 2254(a) in federal district court, the Honorable John R. Tunheim, presiding. The federal district court denied relief based in part on the Magistrate Judge's report and recommendation. We affirm the dismissal of the petitioner's habeas claim based upon the well-reasoned opinion of the district court. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

EDWARD MAURICE COOPER, a/k/a Hamid Abdul Wadud,

Petitioner,

v.

GOTHRIEL J. LAFLEUR, Commissioner of Corrections, MN,

Respondent.

Civil No. 98-1827 (JRT/AJB)

ORDER ON MOTION FOR CERTIFICATE OF APPEALABILITY

Albert T. Goins, Sr., WARD, GOINS, WARD & WOOD, 1919 University Avenue East, Suite 116, St. Paul, MN 55104, for petitioner.

Donna J. Wolfson, Assistant Hennepin County Attorney, HENNEPIN COUNTY ATTORNEY'S OFFICE, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487, for respondent.

On March 28, 2000, the Court denied petitioner Edward Maurice Cooper's petition for writ of habeas corpus. This matter is before the Court on petitioner's motion for a certificate of appealability. For the reasons set forth below, the motion is granted with respect to two of the claims petitioner raised in his habeas petition.

A district court may issue a certificate of appealability only if the applicant has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 53(c)(2);

Tiedeman v. Benson, 122 F.3d 518, 523 (8th Cir. 1997). To make such a showing, the issues must be debatable among reasonable jurists, a court must be able to resolve the issues differently, or the case must deserve further proceedings. *See Flieger v. Delo,* 16 F.3d 878, 882-83 (8th Cir. 1994).

Petitioner, who is deaf, is serving a thirty-year sentence for first-degree criminal sexual conduct in the Minnesota Correctional Facility in Stillwater. Petitioner asserted four grounds for habeas relief. (1) that he was denied effective assistance of counsel at trial because his counsel failed to procure a sign language interpreter for two-thirds of their pre-trial meetings; (2) that the state trial court should have granted him an evidentiary hearing on other ineffective assistance of counsel claims involving counsel's alleged failure to uncover exculpatory evidence; (3) that he was denied effective assistance of counsel at trial because his trial counsel's partner simultaneously represented the victim's mother, who was a witness at the trial, in her divorce proceedings; and (4) that he was denied due process because he was not present at a critical stage of the proceedings when his counsel advised the trial court, shortly after trial began, of this potential conflict of interest.

Petitioner's motion does not state which of the four claims he brought should be certified for appeal. In his accompanying memorandum, however, petitioner limits his request for a certificate to his first and third claims. The Court concludes that a certificate of appealability should be granted with respect to these claims. Although this Court is of the opinion that petitioner failed to show that his counsel's alleged ineffectiveness prejudiced him, the Court believes that whether prejudice to petitioner should be presumed under the circumstances he describes is debatable among reasonable jurists.

ORDER

Based upon the foregoing, and all of the files and records herein, **IT IS HEREBY ORDERED** that petitioner's motion for a Certificate of Appealability [Docket No. 11] is **GRANTED** with respect to the following:

1. Petitioner's claim that he was denied effective assistance of counsel because his trial counsel failed to procure a sign language interpreter for two-thirds of their pretrial meetings, and

2. Petitioner's claim that he was denied effective assistance of counsel because his trial counsel's partner simultaneously represented the victim's mother, who was a witness at the trial, in her divorce proceedings.

Dated: May 2, 2000.

/s/
JOHN R. TUNHEIM
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

EDWARD MAURICE COOPER, a/k/a Hamid Abdul Wadud,

Petitioner,

v.

GOTHRIEL J. LAFLEUR, Commissioner of Corrections, MN,

Respondent.

Civil No. 98-1827 (JRT/AJB)

ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Albert T. Goins, Sr., WARD, GOINS, WARD & WOOD, 1919 University Avenue East, Suite 116, St. Paul, MN, for petitioner.

Donna J. Wolfson, Assistant Hennepin County Attorney, HENNEPIN COUNTY ATTORNEY'S OFFICE, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487, for respondent.

This matter is before the Court on petitioner Edward Maurice Cooper's objections to the Report and Recommendation of United States Magistrate Judge Arthur J. Boylan dated April 7, 1999. The Magistrate Judge recommends that petitioner's petition for writ of habeas corpus be denied. The Court has conducted a *de novo* review of petitioner's objections to the Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(C) and D. Minn. LR

72.1(c)(2). For the reasons set forth below, the Court adopts the Report and Recommendation and denies the petition.

BACKGROUND

Petitioner, who is deaf, is serving a thirty-year sentence for first-degree criminal sexual conduct in the Minnesota Correctional Facility in Stillwater. Petitioner raises four grounds for habeas relief. He contends that he was denied the effective assistance of counsel at trial because his counsel failed to procure a sign language interpreter for most of their pretrial meetings. He also contends that the state trial court should have granted him an evidentiary hearing on other ineffective assistance of counsel claims involving counsel's alleged failure to uncover exculpatory evidence.[1] He further argues that his trial counsel labored under a conflict of interest because his counsel's partner simultaneously represented the victim's mother, who was a witness at the trial, in her divorce proceedings. Finally, petitioner contends he was denied due process because he was not present at a critical stage of the proceedings when his counsel advised the trial court, shortly after trial began, of this potential conflict of interest.

Petitioner was convicted on August 2, 1993. Thereafter, he filed a notice of appeal, and then moved for a stay of his appeal pending post-conviction proceedings in the trial court. Petitioner raised numerous grounds for post-conviction relief in the trial court, including all those detailed above. The trial court denied post-conviction relief, and the Minnesota Court of Appeals affirmed. Petitioner did not, however, appeal the denial of every ground he raised in his post-conviction

[1] As detailed below, this claim appears in the petition itself under the heading "denial of effective assistance of counsel." As is clear from petitioner's various memoranda, however, he is actually contesting the state court's denial of an evidentiary hearing on his ineffective assistance claims.

petition. In particular, he admits that he did not appeal the denial of his claim that he was denied due process because he was not present at a critical stage of the proceedings.

ANALYSIS

I. Exhaustion of State Remedies

Respondent argued to the Magistrate Judge that petitioner's entire petition should be dismissed because petitioner did not exhaust his due process claim in state court. The Magistrate Judge held that petitioner's due process claim was factually intertwined with his conflict of interest claim, and that therefore both claims were exhausted. Although exhaustion of all claims is ordinarily required, *see Rose v. Lundy*, 455 U.S. 509, 519-20 (1982), a district court may deny an entire petition on the merits even if it contains unexhausted claims. *See* 28 U.S.C. § 2254(b)(2). The Court has examined petitioner's claims and has determined that they are without merit. Because requiring the petitioner to delete his allegedly unexhausted claim would only delay an inevitable result, therefore, the Court addresses petitioner's claims on the merits.

II. Lack of an Interpreter

The Sixth Amendment guarantees that an accused shall have "the Assistance of Counsel for his defense." U.S. Const. amend. VI. This constitutional guarantee requires that counsel must be sufficiently "effective" in playing the role necessary to ensure a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Ordinarily, to prevail on a claim of ineffective assistance of counsel, petitioner must show both that her counsel's performance was deficient, and that the deficient performance prejudiced her defense. *See id.* at 687. The performance standard is whether counsel's

assistance was reasonable considering all the circumstances, and petitioner must overcome a presumption that the challenged action was reasonable. *See id.* at 688-89. In certain limited circumstances, however, there is such a likelihood of prejudice to the accused that courts will presume prejudice without any inquiry into counsel's actual performance. *See United States v. Cronic,* 466 U.S. 648, 658 (1984).

Petitioner has not pointed to any aspect of his counsel's representation that fell below the standards set forth in *Strickland.* Instead, petitioner contends that the presumption of prejudice described in *Cronic* should apply where counsel failed to procure a sign language interpreter for two-thirds of their pretrial meetings. During these meetings, petitioner and his counsel communicated via written notes. Petitioner presented evidence to the state post-conviction court that he has a limited understanding of written English; however, there was conflicting testimony during petitioner's trial that would indicate that petitioner has some ability to hear and to communicate both verbally and in writing. Furthermore, petitioner's counsel procured a sign language interpreter for meetings he considered important. Petitioner argues that his counsel's failure to procure a sign language interpreter violated federal and state laws proscribing discrimination against disabled persons. While this circumstance may be relevant in assessing whether counsel's performance was deficient, it does not necessarily show that counsel's performance prejudiced petitioner. The fact remains that in this case, the effect of counsel's failure to procure a sign language interpreter might reasonably be disputed. Under these circumstances, therefore, the Court agrees with the Magistrate Judge and the state courts that it would be inappropriate to presume prejudice. Because petitioner has not attempted to show how his counsel's representation otherwise prejudiced him, the Court denies this claim.

III. Denial of a Hearing

In his petition, petitioner characterizes this claim as alleging the denial of effective assistance of counsel. In summary fashion, petitioner lists numerous errors involving counsel's alleged failure to uncover and develop exculpatory evidence. In his memorandum to the Magistrate Judge as well as in his objections, however, petitioner discusses this claim in terms of the state post-conviction court's denial of an evidentiary hearing on his claims of ineffective assistance. This treatment is in keeping with the issues he raised on appeal in state court. The state post-conviction court granted petitioner an evidentiary hearing on some of his claims of ineffective assistance of counsel, but denied other claims without a hearing. Petitioner appealed the denial of an evidentiary hearing, but did not appeal the trial court's denial on the merits. As the respondent notes, therefore, insofar as petitioner is attempting to resurrect the merits of these claims, he has failed to exhaust them.

In any event, however, petitioner does not address the merits of these claims, but merely takes issue with the fact that the state court did not grant him an evidentiary hearing. Whether to grant an evidentiary hearing in a state post-conviction proceeding is clearly a matter of state law. *See* Minn. Stat. § 590.04. In contrast, habeas relief is limited to cases where a petitioner can show that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Whether the state court's denial of an evidentiary hearing was improper under state law, therefore, is not a proper subject of federal habeas review. *See Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). Petitioner does not explain how the denial of a hearing violated federal constitutional or statutory law. Accordingly, the Court denies this claim.

IV. Conflict of Interest

On the first day of petitioner's trial, the victim's mother arrived to testify as the state's first witness. Petitioner's counsel recognized her as his partner's client, but he did not know her personally, and indeed did not recognize her name when he saw it on the state's witness list. His partner had represented the mother in her uncontested divorce. The decree was filed on May 17, 1993, and the representation continued for ninety-one days thereafter during which an appeal could be filed. Petitioner's trial took place during the ninety-one day period; however, the mother never sought further legal services after the filing of the decree.

Upon recognizing the witness, petitioner's counsel called a sidebar. During a recess in chambers, the prosecution and defense counsel informed the court of the representation, but stated, erroneously, that the divorce was completed three years earlier. The court then asked if either side saw any potential conflict, and both lawyers answered no. Petitioner was not present during this colloquy.

Two lines of authority govern the analysis when a defendant alleges that his attorney had a conflict of interest. Under *Holloway v. Arkansas,* when a defendant apprises the court of a probable risk of a conflict of interest, the court must either appoint other counsel or "take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." 435 U.S. 475, 484 (1978). If the court fails to discharge this duty of inquiry, "prejudice is presumed and reversal of the conviction is automatic." *Atley v. Ault,* 191 F.3d 865, 870 (8th Cir. 1999). If the court is never told of a potential conflict and none is apparent, however, the petitioner must demonstrate that an actual conflict of interest adversely affected his counsel's performance. *See Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980).

Both parties here contend that *Holloway* governs this case because petitioner's counsel brought the fact of his

partner's representation of the mother to the trial court's attention. The Magistrate Judge held, however, that the standard of *Cuyler* applies because counsel did not inform the court of a "probable risk of conflict;" instead, he merely informed the court of the fact that his partner had, at one time, represented the mother in an unrelated divorce action. The Court agrees with the Magistrate Judge that the nature of counsel's communication with the court did not trigger the duty of inquiry under *Holloway.* In *Cuyler,* the Court recognized that the mere fact of counsel's representation of multiple defendants does not always impose upon the court an affirmative duty of inquiry. *See Cuyler,* 446 U.S. at 347-48. Similarly, the facts related to the trial court in this case did not alert the court to any probable conflict that would require further inquiry. Both attorneys affirmed that they saw no potential conflict, and the trial court was entitled to rely on this representation. *See Holloway,* 435 U.S. at 485 (stating that attorneys are in the best position to advise the court of potential conflicts). As previously discussed, petitioner has not shown that his counsel's performance prejudiced him. Therefore, under *Cuyler,* this claim has no merit.

Even if the trial court had a duty to inquire under *Holloway,* however, the court adequately fulfilled its duty by asking counsel whether any potential conflict existed. Under *Holloway,* "the nature of the factual inquiry required...is necessarily case-specific, and...in some cases, no inquiry may be required because all of the relevant facts have been disclosed to the court." *Atley,* 191 F.3d at 872. In this case, neither defense counsel nor the prosecution felt that any conflict existed. The potentially conflicting representation involved an unrelated civil case. Given that the mother's name appeared on the state's witness list prior to trial, it would have been apparent to the court that defense counsel did not know the mother by name, but only by sight. Admittedly, the court was misinformed regarding the timing of the representation. Counsel's mistake on this point,

however, merely underscores how little contact he had with her. Under these circumstances, the court adequately fulfilled its duty under *Holloway*. The Court thus denies petitioner's conflict of interest claim.

V. Due Process

Petitioner contends his absence from the meeting between counsel and the trial judge concerning his counsel's potential conflict of interest violated his due process right to be present at all critical stages of the proceedings. If the failure to secure petitioner's presence at this meeting was error, the error was harmless. *See Rushen v. Spain,* 464 U.S. 114, 117 n.2 (1983) (explaining that harmless error analysis applies to violations of the right to present at critical stages of the trial). Petitioner had ample opportunity in the state post-conviction court to demonstrate how his counsel's alleged conflict prejudiced him, and he failed to do so. The Court therefore denies petitioner's due process claim.

ORDER

Based upon all of the files, records, and proceedings herein, the Court **OVERRULES** petitioner's objections [Docket No. 8] and **ADOPTS** the Report and Recommendation of the Magistrate Judge [Docket No. 7]. **IT IS HEREBY ORDERED** that petitioner's petition for writ of habeas corpus [Docket No. 1] is **DENIED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 28, 2000.

/s/
JOHN R. TUNHEIM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

EDWARD MAURICE COOPER — Civil No. 98-1827 (JRT/AJB)

Petitioner,

vs. — **REPORT AND RECOMMENDATION**

GOTHRIEL J. LAFLEUR,
Commissioner of Corrections.,

Respondent.

This matter is before the Court, United States Magistrate Judge Arthur J. Boylan, on petition for habeas corpus relief under 28 U.S.C. § 2254. Respondent has filed an answer. These proceedings have been referred to the undersigned for report and recommendation under 28 U.S.C. § 636 and Local Rule 72.1(c). For the reasons stated below, it is recommended that the petition for writ of habeas corpus be denied.

Background

On the evening of April 22, 1993, twelve year old Heather Robinson went to a park near her home to look for some of her friends. Heather looked at her watch, it was 7:46p.m. Heather then saw a man coming towards her and she tried to run away. The man grabbed her from behind, held a knife to her throat, and dragged her to the nearby woods. There he tied her wrists together with wire, stuffed cotton gauze in her mouth, taped her mouth shut with electrical tape, and raped her.

Upon leaving her, he untied her and took the wire, gauze, and tape with him. Heather watched him leave. As he was walking off, heading up a hill towards the west, he waved to Heather and held his finger to his lips to gesture for her to be quiet. Heather heard her watch beep as he was walking away, it was 8:00p.m.

Heather got dressed, went home, and told her mother what had happened. Mrs. Robinson called the police right away. The police questioned Heather. She described her assailant as black, with a medium to dark complexion, with a black hearing aid in his right ear, no facial hair, and his breath smelled of tobacco. (Trial Tr. 58). She said he was wearing a black tee-shirt with writing on it, a maroon sweatshirt over the tee-shirt, dark blue jeans with bulging pockets, and a baseball cap that said something to the effect of "I haven't had sex in a long time." (Tr. 107). She told an officer that the man had said something like "sh-sh, come with me" and that he had an accent. (Tr. 107).

Heather accompanied the police to the scene of the rape and showed them exactly where it had happened, and the direction where she saw the man walk away. Later that night, police found a pack of Newport Menthol cigarettes and a purple Halo lighter in the area where the man had walked away.

Heather was next taken to a hospital where an examination was done and samples were taken for a sexual assault kit. Physical evidence established that she was forcibly raped. (Tr. 163-64) Later that night, officers arrived with a photo line-up and Heather identified the petitioner as her assailant. (Tr. 120-22).

Detective Jindra, an investigating officer, knew that there was a large apartment complex near the scene of the crime. He called the apartment managers with a description of the assailant to determine if anyone knew someone matching that description. The manager suggested that she knew someone fitting that description at a certain apartment. (Tr. 188). The

officer went to the apartment, spoke to the daughter of the man who fit the description, got his full name and learned that he lived less than a mile away. The detective obtained a search warrant for the suspect's apartment.

Upon executing the search warrant at petitioner's apartment, officers found electrical wire in the dumpster outside the building, which Heather later identified as similar to the wire used to tie her wrists. The wire also matched wire used for a special doorbell on petitioner's apartment. In the apartment, police found black electrical tape, similar to the tape used on Heather's mouth. They also found the same brand lighter and cigarettes that they had found at the scene of the crime. They did not find a knife that the victim could identify or the clothing the victim had described.

Edward Cooper was soon arrested and tried. At trial, defendant's only witness was his sister. She testified that petitioner was at her house from about 2:00p.m. until about 6:00p.m. on the day of the crime. (Tr. 241). He had helped her clean her basement. He had been wearing green pants and a tee-shirt, had a diamond earring in his ear, and was not wearing his hearing aids. Petitioner's sister testified that he left her house about 6:00p.m. and took the bus. It would take him between one and two hours to get home depending on how the buses were running.

Petitioner was convicted on three counts of first degree criminal sexual assault and one count of kidnapping.[1] He filed a notice of appeal but obtained a stay to seek post conviction proceedings. By Order dated July 25, 1995, petitioner was granted a post conviction hearing on whether he was denied assistance of counsel because counsel operated under an actual conflict of interest and because counsel failed to provide a sign language interpreter to petitioner, deaf since age two, during two-thirds of their pretrial meetings.

---

[1] In violation of Minn. Stat. §609.342(1)(a); §609.342(1)(d); §609.342(1)(e)(I); and §609.25(2)(1).

David Redburn, petitioner's trial counsel, testified at the post conviction hearing that from April 23, 1993 until July 16, 1993 he met with petitioner seven times and only once was an interpreter present. (Post Conviction [P.C.] Tr. 47). At the meetings without an interpreter, petitioner and his counsel communicated by writing notes back and forth. (P.C. Tr. 79-82). Mr. Redburn went over concepts several times when petitioner indicated he didn't understand something. Some concepts were very difficult to communicate. On July 16, 1993, when an interpreter was present, Mr. Redburn went over some of the concepts he felt petitioner may not have understood at earlier sessions when an interpreter was not present. (P.C. Tr. 82).

Mr. Redburn felt that, prior to trial, there was adequate communication between himself and petitioner to assist in his defense. (P.C. Tr. 88). Mr. Redburn obtained an interpreter for what he considered to be important meetings. (P.C. Tr. 103). The first meeting where he used an interpreter was when he obtained a theory of the case, gathering as much information as possible from the petitioner. (P.C. Tr. 103).

Dr. Susan Rose gave her expert testimony regarding petitioner's ability to communicate. She stated that his primary language is American Sign Language and English is his second language and is rudimentary in that he would not have "a full understanding that hearing persons would have of multiple meanings, figurative language, a full command of the syntax of English and of the subtleties that can come up in the way we talk and the way we communicate." (P.C. Tr. 117). Dr. Rose testified that petitioner is able to understand English in writing and to speech read at a specific level, generally of ritualistic phrases. (P.C. Tr. 120). Through writing, one could probably understand petitioner's communication but it is doubtful that he could understand what was being written to him. (P.C. Tr. 123). Dr. Rose believes petitioner's English proficiency is roughly at a third grade level. (P.C. Tr. 137).

The state's expert, Dr. Katherine Jankowski, testified that there would have been some understanding that occurred during the written communications between petitioner and his counsel without an interpreter present. (P.C. Tr. 180). The level of understanding could not be discerned without looking at the written notes. (P.C. Tr. 180). Those notes were not available. Petitioner's rebuttal expert testified that the written communication between petitioner and his counsel would be ineffective if it involved complex matters. However, the expert had no knowledge of what was written, so had no way of knowing whether the communication was effective. (P.C. Tr. 234).

During the post conviction hearing, the Court discussed with counsel whether they intended to waive the attorney-client privilege and discuss the substance of the written notes between petitioner and his trial counsel that occurred without an interpreter present. (P.C. Tr. 51-67). Petitioner's position, as stated through his attorney at the post conviction hearing, was that their expert would establish that there was no effective communication between attorney and client when an interpreter was not present. Therefore, their theory was that prejudice in the outcome of the trial would be presumed and need not be established with testimony such as, hypothetically "that they discussed a potential alibi or that they discussed potentially DNA evidence or the absence of DNA evidence." (P.C. Tr. 55-59).

Regarding the conflict of interest claim, the post conviction court made the following findings.

> 5. [Petitioner's] trial counsel, David Redburn, was a member of the law firm Thurston, Redburn and Johnson, P.A. Steven Thurston represented Kimberly Robinson, mother of the sexual assault victim, in her marriage dissolution proceedings. The Judgment and Decree in Ms. Robinson's case was filed on May 17, 1993 and indicated that Mr. Thurston would continue to represent

Ms. Robinson for 91 days after the filing of the Judgment and Decree.

6. Ms. Robinson's daughter was sexually assaulted on April 22, 1993. [Petitioner], represented by Mr. Redburn was convicted of criminal sexual conduct and kidnapping on August 2, 1993. The conviction was within 91 days of Mr. Thurston's continued representation of Ms. Robinson.

7. [Petitioner] indicates he did not even know about the potential conflict of interest. [Petitioner] was not present when his trial counsel was speaking about his potential conflict with the trial judge and the prosecuting attorney.

8. Steven H. Thurston testified that he was the attorney for the victim's mother in her divorce. Thurston and Redburn were partners who shared fees and maintained a single file room. Mr. Thurston did not recall if he discussed Ms. Robinson's case with Mr. Redburn. He did not recall ever being at the trial of the petitioner, but may have stopped by one time to see how things were going for Mr. Redburn during court break. The testimony of Mr. Thurston was entirely credible.

Upon hearing, the Hennepin County District Court found that petitioner was not denied counsel due to counsel's conflict of interest, and although counsel failed to meet his duty of care by failing to provide an interpreter for two thirds of all attorney-client meetings, petitioner failed to establish, but for the unprofessional conduct, the outcome of the trial would have been different. Petitioner then appealed his conviction, appealed the order limiting his post conviction hearing to two issues, and appealed the denial of his post conviction relief. The Minnesota Court of Appeals, in a published decision,[2] affirmed the conviction, affirmed the

[2] Cooper v. State, 565 N.W.2d 27 (Minn. Ct. App. 1997).

orders of the post conviction court, and modified the sentence. The Minnesota Supreme Court denied review.

Petitioner filed a petition for a writ of habeas corpus under U.S.C. § 2254 on August 5, 1998. Petitioner raises three grounds alleging denial of effective assistance of counsel: 1) failure of counsel to provide deaf defendant with sign language interpreter at two-thirds of attorney-client meetings; 2) counsel failed to call alibi witness, failed to challenge physical evidence, failed to vindicate client's right to testify on his own behalf, failed to disclose conflict of interest; 3) counsel represented client under a conflict of interest without ever disclosing the conflict to the client. Petitioner raises one ground to support denial of due process, that counsel conducted a critical discussion with the Court about a conflict of interest outside the presence of the defendant. Petitioner has exhausted his claims in state court.[3]

DISCUSSION

Habeas review is limited to determining whether there has been a violation of the Constitution or laws of the United States. 28 U.S.C. §2254(a). Petitioner alleges that he was convicted in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

Ineffective Assistance of Counsel

Failure to provide sign language interpreter

To prevail on a claim of ineffective assistance of counsel in violation of the Sixth Amendment a petitioner ordinarily must establish that his attorney's performance "fell below an

[3] The State argues that petitioner failed to exhaust his due process claim in state court but this Court finds that his due process claim was factually intertwined with his conflict of interest claims that were exhausted in state court.

objective standard of reasonableness," and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). The court must look at the evidence before the judge or jury as a whole to determine the effect of alleged attorney errors. Id. at 695. The ultimate focus of the inquiry is fundamental fairness in the proceeding, with relief granted only where there has been a breakdown in the adversarial process, Id. at 696. The petitioner must prove prejudice as the result of the deficient legal performance. Id. at 692.

However, the court will presume prejudice when a defendant is "actually or constructively" denied his right to counsel. United States v. Cronic, 466 U.S. 648 (1984). Prejudice is presumed under "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" Id. at 658, or where "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." Id. at 648. Constitutional error without any showing of prejudice has traditionally been found when counsel is either totally absent or is prevented from assisting the accused during a critical stage of the proceeding. Id. at 660, n,25. The Eighth Circuit in Schaeffer v. Black, 774 F.2d 865 (1985), refused to presume prejudice where petitioner made *no showing of the likelihood of actual prejudice* (relating to his attorney's failure to show him a report prepared by the state ombudsman relating to the incident with which he was charged)(Emphasis added). Claims based on ineffective assistance of counsel presented under § 2254 habeas petitions are reviewed de novo by federal courts. Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994).

Petitioner claims that he was denied effective assistance of counsel and that prejudice should be presumed where petitioner's primary language is American Sign Language and his attorney's is English, and there was no interpreter for two-

thirds of all attorney-client meetings, which encompassed the two and one-half month investigative phase. The State points out that petitioner has not cited any case law to establish that failing to provide a sign language interpreter to a deaf client at two-thirds of the pretrial attorney-client meetings is a constructive denial of counsel whereupon prejudice may be presumed under the Cronic standard. The State suggests that defense counsel reasonably believed he was effectively communicating, although with difficulty, by writing notes with his client. Defense counsel used an interpreter prior to court appearances and for what he considered important matters. An interpreter was present for all court proceedings. The State urges the Court to adopt the Strickland standard, requiring a showing of prejudice for relief to be granted under an ineffective assistance of counsel claim.

No matter which standard the Court applies, petitioner must establish that his counsel's performance was not objectively reasonable. The sum total of the evidence taken from the post conviction hearing establishes that petitioner's counsel was unreasonable to rely on written English for communication with his deaf client, whose primary language was American Sign Language. Mr. Redburn admitted that he had never before represented a deaf client. A reasonable attorney would have attempted to learn the standard practice in such a situation. Minnesota law states that it is the "policy of this state that the constitutional rights of persons handicapped in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings." Minn. Stat. § 611.30.

The first prong of the test having been met, this Court declines to adopt the Cronic standard under the particular facts of this case. The Cronic standard is appropriate where "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." United States v. Cronic, 466 U.S. 648 (1984). In this case, defense counsel obtained an interpreter

for what he considered to be the most important discussions, such as developing the theory of the case and obtaining as much information as possible from the client. When an interpreter was not present, counsel believed that petitioner's responses to his written communications evidenced that petitioner understood the communication. An interpreter was present for all pretrial court proceedings and at trial.

Petitioner had an opportunity in his post conviction hearing to waive the attorney-client privilege so he could obtain testimony from his attorney as to what matters they discussed without an interpreter present. Petitioner's position was that he could establish the basis for a presumption of prejudice without, hypothetically, showing that he unsuccessfully attempted to communicate an alibi with his attorney. Unfortunately, this is precisely the type of information that would be likely to persuade the Court that prejudice should be presumed without further inquiry in this case.

The Eighth Circuit refused to presume prejudice where petitioner made *no showing of the likelihood of actual prejudice.* Schaeffer v. Black, 774 F.2d 865 (1985). Petitioner in this case asks the Court to presume prejudice in a case where the likelihood of prejudice is reasonably disputed. Without any showing of the likelihood of prejudice, such as the inability to communicate an alibi or that a specific misunderstanding occurred that was never corrected, this Court declines to hold that failure to provide a sign language interpreter under these circumstances rendered the trial inherently unfair.

Thus, applying the Strickland standard, the Court finds that petitioner has made no specific showing of prejudice in the outcome of the case. Petitioner has established that there was a potential for miscommunication or even lack of communication at a number of the pretrial attorney-client meetings. The evidence suggests that some communication, at some level occurred. However, petitioner has not

established that any failed attempt at communication which may have occurred could have affected the outcome of the trial or how the defense proceeded at trial.

Petitioner suggests that he could not demonstrate prejudice in the post conviction hearing because the post conviction court refused to hear issues involving petitioner's allegation that his counsel did not search for an alibi witness, did not obtain expert analysis of blood tests/serology/semen evidence, and a number of other claims related to ineffective assistance of counsel. However, the post conviction court recognized petitioner's need to show prejudice and suggested that it may be necessary for petitioner to waive the attorney-client privilege and present evidence of what communication was attempted between petitioner and his counsel without an interpreter present. (P.C. Tr. 54). Petitioner had an opportunity to present such evidence but declined to waive the attorney-client privilege.[4] Instead, petitioner chose to rely on his theory that no matter what communication occurred at those meetings, he was denied effective assistance of counsel, which inherently deprived him of a fair trial. Petitioner had the opportunity to present evidence of prejudice but declined to do so. Petitioner has not met the standard established under Strickland to obtain relief for ineffective assistance of counsel.[5]

---

[4] The trial court recognized the potential for future conflict because of petitioner's tactical strategy in declining to waive attorney-client privilege to present evidence of prejudice. The trial court stated the following:

> Let's assume that hypothetically I agree that you could present this issue and as a tactical matter simply rely upon the expert testimony. What happens at the next post-conviction proceeding in which the new defense lawyer comes in and says you blew it because the only way that you could sustain and win the burden that is now placed upon you was to go for broke and present the attorney-client privilege as waived. (P.C. Tr. 54).

[5] Petitioner claims his counsel violated the Americans with Disabilities Act, 42 U.S.C. §§ 12181(7)(F), 12182(a), by failing to provide

Failure to call alibi witness, to challenge physical evidence, to vindicate client's right to testify on his own behalf, and to disclose conflict of interest

Petitioner claims ineffective assistance of counsel based on trial counsel's failure to call an alibi witness, to challenge physical evidence, failure to have petitioner testify, and failure to disclose fact that one of counsel's partners represented the victim's mother in a divorce. Petitioner requested a post conviction evidentiary hearing on these claims but was denied. Petitioner has exhausted this claim insofar as he has appealed the denial of a post conviction evidentiary hearing.

The denial of an evidentiary hearing in a state post conviction proceeding is a matter of state law and is not reviewable upon habeas petition. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). The decision to take evidence at a post conviction hearing is at the discretion of the court, under Minnesota law, and is not required unless the petitioner alleges facts, which, if proven, would entitle him to relief. Minn. Stat. § 590.04; Roby v. State, 547 N.W.2d 354, 356 (Minn. 1996). Therefore, this Court will not review the state court denial of an evidentiary hearing on these issues.

Conflict of interest claims

Petitioner alleges that he was denied the right to effective assistance of counsel because the trial court failed to

---

him an interpreter for attorney-client meetings. Petitioner does not assert this claim as a separate basis for habeas relief, but as support for his argument that prejudice should be presumed under the Cronic standard for proving ineffective assistance of counsel. (Pet. Mem. at 18). Petitioner has not provided legal precedent that, under these circumstances, prejudice must be presumed for the purposes of his ineffective assistance of counsel claim under the Sixth Amendment.

adequately inquire into the nature of defense counsel's conflict of interest and that there was an actual conflict that adversely affected his duties to petitioner. The state argues that the trial court's inquiry into conflict was adequate and counsel did not labor under an actual conflict of interest.

On federal habeas review, the findings of fact by the state court are presumed to be correct, 28 U.S.C. §2254(d), The Minnesota appellate court's findings are summarized as follows.[6] The State called the victim's mother as its first witness, Petitioner's attorney immediately recognized her as the client of one of his partners in his law firm. He called a sidebar and informed the court that his partner had represented the victim's mother in a completed divorce action. Upon discussion in chambers, the trial court asked both counsel whether they believed there was a conflict. Neither attorney believed there was a conflict. No record was made of the in-chambers discussion.

Petitioner, through the post conviction hearing, established that Mr. Redburn's law firm represented the victim's mother in her divorce, with the Judgment and decree filed on May 17, 1993 and the representation continued for ninety-one days thereafter, the time when an appeal might have been filed. Mr. Redburn's representation of petitioner occurred during his partner's ninety-one day period of representation of the victim's mother, following the judgment in her divorce.

The Sixth Amendment right to counsel includes a right to representation free from conflict of interest. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103 (1981). The right extends to situations where counsel owes conflicting duties to that defendant and some other third person. United States v. Cook, 45 F.3d 388, 393 (10th Cir. 1995). There are two standards for ineffective assistance of counsel claims based on a conflict of interest. When a

---

[6] State v. Cooper, 565 N.W.2d 27, 29 (Minn. Ct. App. 1997).

defendant has not objected at trial, he must demonstrate that his attorney actively represented conflicting interests and the conflict adversely affected the attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348, 350, 100 S.Ct. 1708, 1718-19 (1980). When an attorney informs the trial court of a probable risk of conflict and the court fails to adequately determine whether a conflict exists, the defendant's conviction must be reversed without inquiry into prejudice. Holloway v. Arkansas, 435 U.S. 475, 484, 488-89, 98 S.Ct. 1173, 1178-79, 1181 (1978).

Defense counsel in this case did not inform the court of "a probable risk of conflict" as would require a reversal of defendant's conviction if the trial court failed to adequately inquire into the conflict. Mr. Redburn informed the trial court that he recognized the state's first witness as a former client of a partner in his law firm. He did not believe there was a conflict but wished to inform the court of the situation. The court inquired into the nature of Mr. Redburn's firm's representation of the victim's mother and was satisfied that there was no conflict. The prosecutor did not feel there was a conflict.

However, a post conviction hearing was ordered and petitioner was able to inquire more fully into the nature of the conflict but failed to establish that a conflict existed, This is not a case where the court was informed of a "probable risk of conflict" where inadequate steps to determine the nature of the conflict require reversal of the defendant's conviction. Thus, petitioner has the burden to demonstrate that his attorney actively represented conflicting interests and the conflict adversely affected the attorney's performance.

Even assuming that petitioner's attorney "actively represented conflicting interests[7]," petitioner has failed to

---

[7] Petitioner can not meet the second prong of the test required to prove ineffective assistance of counsel caused by representation under a conflict of interest, so the Court declines to decide whether Mr. Redburn actively represented conflicting interests under the first prong of the test.

establish that the conflict adversely affected his attorney's performance. Defense counsel's performance is adversely affected if a genuine alternative strategy was available but was inherently in conflict with his duty to others. Selsor v. Kaiser, 81 F.3d 1492 (10th Cir. 1996).

To meet this standard, petitioner suggests that his trial counsel's loyalty was impaired by his obligation of confidentiality to the victim's mother, imputed to him by his partner's representation of her in her divorce, and as a result his counsel did not conduct a vigorous cross-examination of the victim's mother. Petitioner's only factual support for this claim is that his counsel did not cross examine the victim's mother on whether her spouse had ever acted in sexually inappropriate ways toward the victim.

Evidence taken in the post conviction hearing established that the victim had no contact with her father for one and a half years prior to the rape. (P.C. Tr. 7). There is overwhelming evidence that the victim was forcibly raped, and had been a virgin at the time of the rape. Cross examination on the issue of the victim's father's possible abuse of the victim, which is very unlikely to have been admissible at trial[8] and is not supported by any facts, falls far

---

However, because the record establishes that Mr. Redburn was not actively involved in the victim's mother's divorce, and his partner was not actively involved in petitioner's defense, the Court points out that the only way to arrive at a conclusion that Mr. Redburn actively represented conflicting interests is to impute the knowledge obtained, and the duties owed by Redburn's partner in his representation of the victim's mother to Redburn. The Court has doubts that such a theory could establish "active" representation of conflicting interests to support a claim of ineffective assistance of counsel.

[8] Such evidence is likely irrelevant but even if relevant would be inadmissible under Minn. Stat. § 609.347, which states,

> In a prosecution under sections 609.109, 609.342 to 609.3451, or 609.365, evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in subdivision 4. The evidence can be admitted only if

short of establishing that Mr. Redburn's representation of petitioner was adversely affected by his partner's representation of the victim's mother in her uncontested divorce.

Due Process

Petitioner contends that his absence from the trial court's in-chambers discussion of a potential conflict of interest relating to the state's first witness denied him the right to confront a witness and the right to counsel of his own choosing, in violation of his due process rights under the Constitution. The State argues that it was harmless error for petitioner not to be present at the in-chambers discussion. Petitioner suggests that his right to counsel of his own choosing unfettered by conflict of interest by its nature is not harmless.

Petitioner's due process claim is dependent on a showing that he was deprived an opportunity to confront a witness or deprived of a right to counsel. As the Court discussed in relation to petitioner's claim of ineffective assistance of counsel, petitioner has failed to present evidence that the alleged conflict had any adverse affect on his counsel's cross examination of the state's witness or that the alleged conflict had any adverse affect on the outcome of his trial. Therefore, the lack of petitioner's presence at the trial court's in-chambers discussion of a potential conflict was harmless error.

---

the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the circumstances set out in paragraphs (a) and (b).

RECOMMENDATION

For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

1. Petition for writ of habeas corpus be denied. (Docket No. 1).

2. This action be dismissed with prejudice.

Dated 4/7/99

/s/
ARTHUR J. BOYLAN
United States Magistrate Judge

STATE OF MINNESOTA
IN COURT OF APPEALS
C7-96-1838

Edward Maurice Cooper, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 10, 1997
Affirmed as modified
Short, Judge

Hennepin County District Court
File No. 93030428

John M. Stuart, State Public Defender, Dean R. Karau, Special Assistant Public Defender, Fredrikson & Byron, P.A., 1100 International Centre, 900 Second Avenue South, Minneapolis, MN 55402; and

Albert T. Goins, Sr., 1885 University Avenue #1, St. Paul, MN 55104 (for appellant)

Hubert H. Humphrey, III, Attorney General, 102 State Capitol, St. Paul, MN 55155; and

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Short, Presiding Judge, Lansing, Judge, and Klaphake, Judge.

SYLLABUS

Unless circumstances surrounding the representation of a defendant justify a presumption of ineffectiveness of counsel, attorney errors do not entitle the defendant to relief absent an affirmative showing of prejudice. When a trial court has adequately inquired into a defense counsel's alleged conflict of interest, the defendant seeking relief must establish that defense counsel operated under an actual conflict of interest, which adversely affected counsel's performance.

OPINION

SHORT, Judge

A jury convicted Edward Maurice Cooper of three counts of first-degree criminal sexual conduct and one count of kidnapping. On appeal from his conviction, sentence, and denial of postconviction relief, Cooper argues: (1) he was denied assistance of counsel by his attorney's failure to provide a sign language interpreter; (2) he was denied effective assistance due to his attorney's conflict of interest; (3) the postconviction court erred in limiting the scope of his evidentiary hearing; (4) his conviction is founded on insufficient evidence; and (5) the sentencing court erred in departing durationally and dispositionally from the presumptive guidelines sentence.

FACTS

On April 22, 1993, Cooper abducted a 12-year-old girl from a playground at knifepoint. He dragged the victim into a wooded area of the park, bound and gagged her, and removed her pants. Before fleeing, Cooper committed multiple penetrations and forced the victim to perform oral sex on him.

Cooper has been completely deaf since he was two and a half years old. He communicates primarily through American Sign Language (ASL). ASL is not simply English communicated through hand movements, but a significantly different language. Consequently, Cooper has a limited understanding of English and reads at only the third-grade level.

Prior to trial, Cooper's trial attorney failed to obtain the services of a sign language interpreter for two-thirds of his meetings with Cooper. Absent an interpreter, the attorney and Cooper communicated by "passing the pad" with notes written in English, using incomplete sentences and common abbreviations. The attorney used the meetings with an interpreter present to discuss concepts he believed Cooper had failed to understand in previous, uninterpreted meetings. In total, Cooper and the attorney met for approximately five hours with the aid of an interpreter before trial.

Cooper proceeded to trial on three counts of first-degree criminal sexual conduct and one count of kidnapping. When the state called the victim's mother as its first witness, Cooper's attorney realized the witness was the client of a partner in his law firm. The attorney called a sidebar and advised the court and opposing counsel that his partner had represented the victim's mother in a completed divorce action. After a short discussion in chambers, the trial court asked both counsel whether they perceived a potential conflict, and both answered in the negative. No record was made of the in-chambers discussion.

After trial, the jury convicted Cooper on all three counts of first-degree criminal sexual conduct and the single count of kidnapping. On the state's motion, the trial court imposed the statutory maximum sentences of 30 years for the criminal sexual conduct and 20 years for the kidnapping, to be served consecutively. This 50-year executed sentence equals 4.92 times the presumptive guidelines sentence of 122 months

executed for the criminal sexual conduct and 30 months stayed for the kidnapping.

Cooper petitioned for postconviction relief after this court dismissed his direct appeal. The postconviction court denied relief, without a hearing, on all issues except the attorney's failure to provide an interpreter and alleged conflict of interest. Following a hearing on those two issues, the postconviction court again denied relief, finding: (1) although defense counsel fell below the standard of objective reasonableness in failing to provide an interpreter for two-thirds of his pretrial meetings with Cooper, Cooper had not shown resultant prejudice to his case; and (2) Cooper's attorney did not operate under an actual conflict of interest.

ISSUES

I. Did the postconviction court err in finding Cooper received effective assistance of counsel in spite of his attorney's failure to use a sign language interpreter in two-thirds of their pretrial meetings?

II. Did the postconviction court err in finding Cooper was not denied effective assistance of counsel as a result of his attorney's alleged conflict of interest?

III. Did the postconviction court abuse its discretion in denying, without a hearing, the balance of the claims in Cooper's petition for postconviction relief?

IV. Was Cooper's conviction founded upon sufficient evidence?

V. Did the trial court abuse its discretion in sentencing Cooper to 4.92 times the presumptive guidelines sentence?

ANALYSIS

In reviewing the order of a postconviction court, our function is to determine whether the record sustains the

findings and whether the decision constitutes an abuse of discretion. ***Miller v. State,*** 531 N.W.2d 491, 492 (Minn. 1995); ***see Kochevar v. State,*** 281 N.W.2d 680, 687 (Minn. 1979) (recognizing factual findings of postconviction court will not be disturbed if supported by sufficient evidence).

I.

The Sixth Amendment guarantees the fundamental right of an accused to be represented by counsel. ***United States v. Cronic,*** 466 U.S. 648, 653, 104 S. Ct. 2039, 2043 (1984). This right encompasses not only the provision of counsel, but also actual assistance from counsel. ***Id.*** at 654, 104 S. Ct. at 2044. A defendant claiming ineffective assistance must show that "his counsel's representation 'fell below an objective standard of reasonableness.'" ***Hanley v. State,*** 534 N.W.2d 277, 279 (Minn. 1995) (quoting ***Strickland v. Washington,*** 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)).

Cooper argues his attorney's failure to provide an ASL interpreter at two-thirds of their pretrial meetings rendered Cooper unable to effectively understand or communicate with the attorney, thus actually or constructively denying him assistance of counsel. The postconviction court found the attorney's representation of Cooper fell below an objective standard of reasonableness because persons disabled in communication are entitled to interpretive assistance to facilitate full participation in the defense. ***See*** 42 U.S.C. §§ 12181(7)(F), 12182(a) (1994) (prohibiting disability discrimination in full enjoyment of services, including legal services); ***State v. Dominguez-Ramirez,*** __ N.W.2d __, __ n.3 (Minn. 1997) (citing Minn. Stat. §§ 611.30-.33 and recognizing that constitutional rights of persons disabled in communication cannot be fully protected without qualified interpreters to assist in legal proceedings); ***see also State v. Marin,*** 541 N.W.2d 370, 373-74 (Minn. App. 1996) (excluding statement taken from non-English speaker without

interpreter, concluding suspect who lacks understanding of legal proceedings cannot make intelligent waiver of rights), *review denied* (Minn. Mar. 27, 1996).

In addition to showing deficiency of counsel, however, a defendant claiming ineffective assistance ordinarily must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hanley,* 534 N.W.2d at 279 (quoting *Strickland,* 466 U.S. at 688, 104 S. Ct. at 2068)). Prejudice need not be proven under circumstances in which,

> although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Cronic, 466 U.S. at 659-60, 104 S. Ct. at 2047. Thus, when surrounding circumstances justify a presumption of ineffectiveness, a Sixth Amendment claim is sufficient without inquiry into counsel's actual performance at trial. *Id.* at 662, 104 S. Ct. at 2048. The presumption of prejudice applies when a defendant is denied counsel at a critical stage of trial, or defense counsel entirely fails to subject the state's case to meaningful adversarial testing. *Id.* at 659, 104 S. Ct. at 2047; *compare House v. Balkcom,* 725 F.2d 608, 620 (11th Cir.) (applying *Cronic* analysis to case in which attorneys' negligent conduct "constitute[d] no representation at all"), *cert. denied,* 469 U.S. 870 (1984); *State v. Wiplinger,* 343 N.W.2d 858, 861 (Minn. 1984) (presuming prejudice where defense counsel impliedly admitted defendant's guilt without permission of defendant); *with Scarpa v. Dubois,* 38 F.3d 1, 15 (1st Cir. 1994) (refusing to apply *Cronic* "presumed prejudice" rule where defense counsel conceded sole contested issue in case), *cert. denied,* 115 S. Ct. 940 (1995);

State v. Savage, 577 A.2d 455, 466 (N.J. 1990) (declining to presume prejudice in capital case where defense counsel met with defendant only once). The common thread in the cases presuming prejudice is attorney conduct that is, "in general so antithetic to effective assistance * * * that a case-by-case analysis simply is not worth the cost." *Scarpa,* 38 F.3d at 12 (emphasis omitted).

Cooper argues the nature of his attorney's error in failing to provide a sign language interpreter justifies the reversal of his conviction without inquiry into the actual prejudice caused to the defense. We disagree. We recognize that pretrial communication between a defendant and counsel is essential to afford a defendant a fair trial. *See Avery v. Alabama,* 308 U.S. 444, 446, 60 S. Ct. 321, 322 (1940) (noting denial of opportunity for appointed counsel to confer, consult with accused, and prepare defense would convert appointment into sham). However, the evidence shows: (1) when Cooper and the attorney were not assisted by an interpreter, they achieved some communication through writing; (2) a sign language interpreter was present at approximately one-third of the pretrial meetings between Cooper and his attorney, for a total of five hours; (3) in meetings with an interpreter, the attorney attempted to readdress issues he believed Cooper had had difficulty comprehending in previous, uninterpreted meetings; (4) the trial court provided interpreters for all of Cooper's court proceedings; (5) Cooper does not allege to have failed to understand any particular issues in his case or strategic decisions by his attorney; and (6) Cooper does not allege to have failed to communicate any piece of information, including the existence of exculpatory evidence, to his attorney.

Given these facts, we conclude the circumstances surrounding the attorney's representation of Cooper do not warrant a presumption of ineffectiveness of counsel. *Cf. Hernandez v. Wainwright,* 634 F. Supp. 241, 249 (S.D. Fla. 1986) (requiring Spanish speaker to demonstrate prejudice

from counsel's failure to provide interpreter in two of three pretrial meetings), ***aff'd without opinion,*** 813 F.2d 409 (11th Cir. 1987). While Cooper achieved only imperfect communication with his attorney, he was, nonetheless, assisted by counsel; Cooper was not denied counsel at a critical stage, and his attorney did not fail to subject the state's case to meaningful adversarial testing. ***Cf. Geders v. United States,*** 425 U.S. 80, 92, 96 S. Ct. 1330, 1337 (1976) (presuming prejudice from counsel's denial of access to defendant for 17-hour overnight trial recess); ***Martin v. Rose,*** 744 F.2d 1245, 1250-51 (6th Cir. 1984) (reversing conviction without showing of prejudice where counsel failed to make arguments, call or cross-examine witnesses, or make objections). This simply is not the total failure of representation that would permit us to presume that Cooper's constitutional right to effective assistance of counsel was abridged.

Absent a presumption of prejudice, Cooper can prevail in his ineffective assistance claim only upon proof of a reasonable probability that the outcome of the proceedings would have been different but for his attorney's failure to provide an interpreter for pretrial meetings. ***See Hanley,*** 534 N.W.2d at 279 (quoting ***Strickland,*** 466 U.S. at 694, 104 S. Ct. at 2068, and requiring affirmative showing of prejudice). However, Cooper cannot identify any facet of trial that might have proceeded differently had an interpreter been present at each pretrial meeting between Cooper and his attorney. Cooper had no additional exculpatory evidence, alibi witness, or theory of defense that he failed to communicate due to the absence of a sign language interpreter. Because Cooper cannot demonstrate prejudice, his petition for postconviction relief on the basis of ineffective assistance of counsel must fail.

II.

The Sixth Amendment right to counsel encompasses a "correlative right to representation that is free of conflicts of interest." ***Wood v. Georgia,*** 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981). This right "is not limited to cases involving joint representation of co-defendants * * * but extends to any situation in which a defendant's counsel owes conflicting duties to that defendant and some other third person." ***United States v. Cook,*** 45 F.3d 388, 393 (10th Cir. 1995) (citation omitted).

The burden of a defendant claiming ineffective assistance due to a conflict of interest depends on whether and to what extent the alleged conflict was brought to the trial court's attention. ***United States v. Fish,*** 34 F.3d 488, 492 (7th Cir. 1994). A defendant who raised no objection at trial must demonstrate that defense counsel "actively represented conflicting interests" and this conflict "adversely affected [the] lawyer's performance." ***Cuyler v. Sullivan,*** 446 U.S. 335, 348, 350, 100 S. Ct. 1708, 1718, 1719 (1980). By contrast, when an attorney informs the trial court of a probable risk of conflict, and the court fails to take adequate steps to ascertain whether an impermissible conflict exists, the defendant's conviction must be reversed without inquiry into prejudice resulting from the alleged conflict. ***Holloway v. Arkansas,*** 435 U.S. 475, 484, 488-89, 98 S. Ct. 1173, 1178-79, 1181 (1978); ***see also Fish,*** 34 F.3d at 492 (requiring trial court inquiry whenever defendant raises issue or trial court otherwise knows or reasonably should know of potential conflict of interest).

Cooper argues he was denied effective assistance of counsel due to the attorney's impermissible conflict of interest between Cooper and the victim's mother. Meeting with both counsel outside the presence of the jury after Cooper's attorney recognized the victim's mother, the trial court learned: (1) a law partner of Cooper's attorney had

represented the victim's mother; (2) the representation involved a dissolution action, which bore no relation to the present criminal case; (3) the dissolution action was complete; and (4) Cooper's attorney did not believe an impermissible conflict existed, but simply wished to bring the matter to the trial court's attention. Given these facts, we conclude the trial court fulfilled its obligation to ascertain whether an impermissible conflict existed. The attorney acted properly in informing the trial court of his relationship to the victim's mother, and the court was entitled to place great weight on the attorney's conclusion that he was not subject to an actual conflict of interest. ***See Holloway,*** 435 U.S. at 485, 98 S. Ct. at 1179 (quoting ***State v. Davis,*** 514 P.2d 1025, 1027 (Ariz. 1973), and noting attorney is in best position professionally and ethically to determine when conflict of interest exists); ***see, e.g., Fish,*** 34 F.3d at 493 (concluding trial court reasonably relied on defense counsel's own assessment of conflict potential). Therefore, the ***Holloway*** rule of presumed prejudice does not compel a reversal of Cooper's conviction.

Furthermore, Cooper has not demonstrated the existence of an actual conflict of interest. The postconviction court found no evidence that Cooper's attorney was in any way involved in the dissolution proceedings of the victim's mother or that the attorney's partner participated in Cooper's defense. ***Cf. State v. Stephani,*** 369 N.W.2d 540, 549 (Minn. App. 1985) (concluding record failed to show actual conflict of interest where, just before trial, defense lawyers learned another attorney from office had previously represented victim in unrelated criminal cases while instant case was pending), ***review denied*** (Minn. Aug. 20, 1985). Additionally, in claiming an actual conflict circumscribed the attorney's representation, Cooper alleges only that the attorney's relationship to the victim's mother prevented him from vigorously cross-examining her concerning the victim's history of sexual abuse. Even if such evidence would be relevant and admissible, Cooper's vague, unfounded

allegations are insufficient to establish that the attorney's conflict adversely affected his representation. The postconviction court properly concluded that Cooper was not entitled to relief on the basis of his attorney's allegedly impermissible conflict of interest.

III.

A postconviction court must afford a petitioner an evidentiary hearing when the petitioner alleges facts that, if proven, would entitle the petitioner to the requested relief. ***Fratzke v. State,*** 450 N.W.2d 101, 102 (Minn. 1990). Cooper argues the postconviction court abused its discretion in denying him an evidentiary hearing on his additional claims, alleging his attorney failed to follow evidentiary leads, present certain testimonial evidence, obtain expert testimony, or meaningfully cross-examine prosecution witnesses. However, the errors Cooper alleges involved the exercise of tactical judgment and will not support a claim of ineffective assistance. ***See State v. Bliss,*** 457 N.W.2d 385, 392 (Minn. 1990) (recognizing choice of witnesses lies in counsel's discretion); ***State v. Buchanan,*** 431 N.W.2d 542, 553 (Minn. 1988) (noting choice of trial tactics generally will not serve as basis for finding ineffective assistance). Moreover, Cooper has presented no evidence that the claimed errors affected the outcome at trial. ***See Fratzke,*** 450 N.W.2d at 102 (authorizing evidentiary hearing only when accused's allegations, if proven, would establish actual prejudice); ***see also Gates v. State,*** 398 N.W.2d 558, 563 (Minn. 1987) (rejecting ineffective assistance claim where petitioner failed to establish adequate trial preparation would have produced favorable witness whose testimony would have changed outcome of trial); ***Crisler v. State,*** 520 N.W.2d 22, 26 (Minn. App. 1994) (stating failure to investigate does not constitute ineffective assistance absent a showing proper inquiry would have produced significant exculpatory proof), ***review denied***

(Minn. Sept. 28, 1994). Under these circumstances, the postconviction court did not abuse its discretion by denying Cooper an evidentiary hearing on these additional claims of ineffective assistance.

IV.

This court must affirm a verdict if the evidence is such that a jury could reasonably conclude, under the facts and any legitimate inferences, that the defendant was guilty of the crime charged. ***State v. Langley,*** 354 N.W.2d 389, 395 (Minn. 1984). In reviewing the record, we view the evidence in the light most favorable to the jury's verdict, assuming the jury believed the state's witnesses and disbelieved any evidence to the contrary. ***State v. Moore,*** 438 N.W.2d 101, 108 (Minn. 1989).

Cooper argues his convictions are founded upon insufficient evidence. However, the record demonstrates: (1) the victim described her assailant in detail both to her mother and to police, and swiftly identified Cooper in a photo line-up the same day as the rape; (2) the victim identified Cooper in court; (3) the victim's account of the rape and kidnapping remained consistent throughout the investigation and trial; (4) in Cooper's apartment, police found two hearing aids matching a description given by the victim, as well as wire and electric tape similar to those used to bind the victim; (5) police found that items retrieved from Cooper's residence, including a pack of Newport menthol cigarettes and a purple Halo lighter, matched those discovered 20 feet from the crime scene; and (6) the serological work was consistent with Cooper as the assailant. Given these facts, the record evidence is sufficient to permit a jury to reasonably conclude that Cooper committed first-degree criminal sexual conduct and kidnapping as charged.

V.

A trial court has discretion to depart from a defendant's presumptive guidelines sentence when the offense involves "substantial and compelling circumstances," which make the facts of a particular case different from the typical case. ***State v. Peake,*** 366 N.W.2d 299, 301 (Minn. 1985) (citation omitted). Generally, in a case in which an upward departure is warranted, the upper limit is double the presumptive sentence length. ***State v. Evans,*** 311 N.W.2d 481, 483 (Minn. 1981). However, some rare cases present facts so unusually compelling that an even greater degree of departure will be justified. ***Id.*** Additionally, although multiple sentences are presumed to run concurrently, consecutive sentences are permissible if "commensurate with culpability and not an exaggeration of defendant's criminality." ***State v. Swanson,*** 498 N.W.2d 435, 440 (Minn. 1993) (permitting concurrent sentences if commensurate with culpability); ***see*** Minn. Sent. Guidelines II.F. (providing presumption of concurrence). The only absolute limit on a sentence is the maximum statutory sentence provided by the legislature. ***State v. Glaraton,*** 425 N.W.2d 831, 834 (Minn. 1988). This court reviews sentencing departures under an abuse of discretion standard. ***Evans,*** 311 N.W.2d at 483.

Cooper argues the trial court erred by sentencing him to the statutory maximum sentences for first-degree criminal sexual conduct and kidnapping, to be served consecutively, resulting in a sentence 4.92 times his presumptive guidelines sentence. We agree. After a careful review of the record, we conclude the trial court considered two improper factors in departing from the guidelines durationally and with respect to consecutive sentencing. First, the age of Cooper's victim was not sufficiently different from the age of the typical victim of conduct charged under Minn. Stat. § 609.342, subd. 1 (1996), to justify a departure on this basis. ***See State v. Brusven,*** 327 N.W.2d 591, 593 (Minn. 1982) (disallowing consideration of

age and resultant vulnerability of criminal sexual conduct victim because legislature already considered those factors in categorizing offense severity levels). Second, the trial court's consideration of the kidnapping as a factor justifying a departure on the criminal sexual conduct sentence was impermissible because the court sentenced Cooper independently for kidnapping. ***Cf. State v. Cox,*** 343 N.W.2d 641, 643 (Minn. 1984) (generally permitting consideration of course of conduct underlying charge for which defendant is being sentenced).

By contrast, the trial court's departure from the guidelines sentence was supported by Cooper's prior conviction for fourth-degree criminal sexual conduct and his particularly cruel conduct in repeatedly penetrating the victim. ***See*** Minn. Sent. Guidelines II.D.2.b.(3) (providing if current conviction is for criminal sexual conduct, prior felony conviction for criminal sexual conduct is proper departure factor); Minn. Sent. Guidelines II.D.2.b.(2) (listing particular cruelty as aggravating factor); ***see also State v. Mesich,*** 396 N.W.2d 46, 52 (Minn. App. 1986) (noting multiple acts of penetration alone will justify double durational departure), ***review denied*** (Minn. Jan. 2, 1987). While these two factors warrant the trial court's upward departure on the criminal sexual conduct sentence, they cannot justify an aggravated sentence for the kidnapping, which was incidental to the rape. ***See State v. Crocker,*** 409 N.W.2d 840, 845 (Minn. 1987) (recognizing statute permitting separate sentence for kidnapping would allow unfair exaggeration of criminality of defendant's conduct where confinement is completely incidental to connected crime, if not for presumption that kidnapping sentence runs concurrently). Under these circumstances, we must conclude the trial court abused its discretion in making an upward departure with respect to the kidnapping sentence. Therefore, we affirm the trial court's imposition of the 30-year maximum statutory sentence for criminal sexual conduct, but modify the kidnapping sentence

to the presumptive concurrent sentence of 30 months, which will be executed.

DECISION

The postconviction court properly found Cooper was not denied effective assistance of counsel by his attorney's alleged conflict of interest or failure to provide a sign language interpreter, and the court did not abuse its discretion in denying Cooper an evidentiary hearing on his remaining allegations of attorney error. In addition, Cooper's convictions are founded upon sufficient evidence. While the trial court's imposition of the statutory maximum sentence for first-degree criminal sexual conduct was appropriate, the kidnapping sentence is modified to conform to the guidelines.

Affirmed as modified.

6-3-97 Margaret D. Short

STATE OF MINNESOTA

IN SUPREME COURT

C7-96-1838

Edward Maurice Cooper, petitioner,

Appellant,

vs.

State of Minnesota,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Edward Maurice Cooper for further review be, and the same is, denied.

Dated: August 5, 1997

BY THE COURT:

/s/ Sandy Keith
Chief Justice

BLATZ, J. took no part in the consideration or decision of this case.

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

ORDER

vs.

#C8-94-1

Edward Maurice Cooper,

Appellant.

BASED UPON THE FILE, RECORD AND PROCEEDINGS HEREIN, AND BECAUSE:

1. Appellant moves to stay this appeal and for a remand to the trial court for the filing of a petition for postconviction relief.

2. It appears an appeal should more properly be taken from an order deciding the postconviction petition, if necessary.

IT IS HEREBY ORDERED:

1. This appeal is dismissed and the matter is remanded for posttconviction proceedings.

2. This order shall not preclude a later appeal from the postconviction order, and shall not limit the issues which may be raised in that appeal.

Dated: May 11, 1994

BY THE COURT

/s/ Paul H. Anderson
Chief Judge

CLL:mbs

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

ORDER
File No. 93030428

Edward Maurice Cooper,

Defendant.

The above-entitled matter came on for hearing before the undersigned pursuant to petitioner's motion for post-conviction relief. The state was represented by James Appleby, Esq., Assistant Hennepin County Attorney. The petitioner was represented by Albert Goins, Esq. and Dean Karau, Esq. Based upon the records, files and proceedings herein, the Court makes the following:

FINDINGS OF FACT:

1. On September 30, 1993, petitioner was convicted by a jury of criminal sexual conduct in the first degree in violation of Minn. Stat. 609.342, subd. 1(a), 609.342, subd. 1(d), and 609.342, subd. 1(e)(i), and kidnapping in violation of Minn. Stat/ 609.25, subd. 2(1). He was sentenced to thirty years on the criminal sexual conduct and twenty years on the kidnapping, both sentences to be served consecutively.

2. On December 29, 1993 petitioner filed an appeal. On May 11, 1994 the appeal was dismissed and the matter was remanded for post-conviction proceedings.

3. Petitioner claims through his post conviction memorandum and hearing that his Sixth Amendment rights were violated as his trial counsel labored under a Constitutionally impermissible conflict of interest and failed to consistently provide petitioner with an interpreter.

4. Petitioner has been deaf since age two and a half.

5. Mr. Cooper's trial counsel, David Redburn, was a member of the law firm Thurston, Redburn and Johnson, P.A. Steven Thurston represented Kimberly Robinson, mother of the sexual assault victim, in her marriage dissolution proceedings. The Judgment and Decree in Ms. Robinson's case was filed on May 17, 1993 and indicated that Mr. Thurston would continue to represent Ms. Robinson for 91 days after the filing of the Judgment and Decree.

6. Ms. Robinson's daughter was sexually assaulted on April 22, 1993. Mr. Cooper, represented by Mr. Redburn, was convicted by a jury of criminal sexual conduct and kidnapping on August 2, 1993. The conviction was within 91 days of Mr. Thurston's continued representation of Ms. Robinson.

7. Petitioner indicates he did not even know about the potential conflict of interest. Petitioner was not present when his trial counsel was speaking about this potential conflict with the trial court judge and the prosecuting attorney.

8. Steven H. Thurston testified that he was the attorney for the victim's mother in her divorce. Thurston and Redburn were partners who shared fees and maintained a single file room. Mr. Thurston did not recall if he discussed Ms. Robinson's case with Mr. Redburn. He did not recall ever being at the trial of the petitioner, but may have stopped by one time to see how things were going for Mr. Redburn during a court break. The testimony of Mr. Thurston was entirely credible.

9. Petitioner also claims that he was denied effective assistance of counsel through his counsel's failure to provide sufficient interpretive services. The petitioner's trial counsel,

David Redburn, testified at the post conviction hearing that during two of seven pre-trial meetings between petitioner and his counsel petitioner was provided with an interpreter. During the remaining five sessions the attorney and the petitioner communicated through what was referred to as "pass-the-pad-sessions." Petitioner's counsel would write down his question or statement on a legal pad in English and petitioner would write a response back in English.

10. Petitioner's counsel argued that petitioner did not have interpretive services as six pre-trial attorney-client meetings. The state argued that petitioner had interpretive services at three pre-trial attorney-client meetings. The jail records, Petitioner's Exhibit 2, revealed that Attorney Redburn visited petitioner in 1993 on April 26, May 18, June 6, June 9, June 10, July 16, July 20, July 24, and August 11. The invoices from Hartman and Hallet Interpreters, Petitioner's Exhibit 3, reveal that interpreters were utilized by the petitioner and Attorney Redburn in 1993 on May 3, July 16, July 20 and August 1. Although all of the above is not entirely consistent, the fact remains that petitioner did not have interpretive services at all of his meetings with his attorney. An interpreter was present at approximately one-third of the meetings between petitioner and attorney Redburn.

11. Prior to the representation of the petitioner, Mr. Redburn had never represented a deaf person. Mr. Redburn had only had two trials prior to the petitioner's--one civil and one criminal.

12. Mr. Redburn testified that it was much easier to communicate with the petitioner with an interpreter, and that it was extremely difficult to get across to him at times when an interpreter was not present.

13. Dr. Susan Rose, who's qualifications as an expert in the field of deaf education were stipulated to, testified that petitioner's primary language is American Sign Language. According to Dr. Rose, petitioner's knowledge of English is

as a second language and is rudimentary. She testified that she did not know what language forms Mr. Redburn used in communicating with petitioner in writing, but she doubted that the petitioner could understand his attorney when the communication was in writing. It was her opinion that the petitioner read at a third grade level. She testified that American Sign Language and English are two very different languages, and emphasized that when a person doesn't know that they didn't understand something, it is very hard to correct because that person simply does not know that they didn't understand the concept.

14. Ronald J. Rasley, an attorney who represents deaf individuals and the Deafness Education Advocacy Foundation, testified for the petitioner. He always uses an interpreter when communicating with clients whom are deaf. It was his opinion that an attorney must use an interpreter to meet his or her standard of care.

15. Dr. Katherine Jankowski testified that there was a probability that there would be some misunderstanding between an American Sign Language speaking person and a non ASL speaking person who communicated exclusively in writing. She added, however, that several subsequent meetings between the petitioner and his attorney with the assistance of an interpreter would have been adequate to clear up any misunderstanding. It was her opinion that effective communication must be with an individual's first and primary language. Through the pass-the-pad sessions, petitioner was not communicating with his attorney in his primary language, which was especially problematic because of legal and complex terms.

16. Shareaine Rawlinson, Executive Director for the Minnesota Foundation for Better Hearing and Speech, testified as an expert for the petitioner as well. It was her opinion that it was very difficult to figure out errors in communication without an interpreter.

17. The petitioner never testified at the post conviction hearing.

CONCLUSIONS OF LAW

1. Petitioner was not denied his Sixth Amendment right to counsel due to his trial counsel's conflict of interest.

2. Petitioner was not denied his Sixth Amendment right to effective assistance by nature of his counsel's failure to consistently provide interpretive services.

ORDER FOR JUDGMENT

Petitioner's petition for a writ of habeas corpus and post conviction relief pursuant to Minn. Stat. 590.01 is denied.

Let Judgment be Entered Accordingly.

BY THE COURT:

Dated: 7-3-96

/s/
Kevin S. Burke
Chief Judge

MEMORANDUM

Petitioner was convicted of criminal sexual conduct and kidnapping and was sentenced to consecutive terms of thirty and twenty years. Petitioner abducted a twelve year old girl at knife point, dragged her into the woods, forced gauze into her mouth, taped her mouth shut, tied her up with wire, and proceeded to engage in sexual and oral intercourse with her. At trial petitioner was represented by an attorney who, although he was relatively inexperienced given the severity of the accusation, did a professional job under difficult circumstances. To the extent that some of the Court's memorandum is critical, this Court's final conclusion is that the attorney deserves credit for agreeing to assure representation of a case many lawyers would decline for all the wrong reasons and for arguing effectively on his client's behalf.

The burden of proof in a post-conviction proceeding is on the petitioner to establish the facts by a fair preponderance of the evidence. Minn. Stat. 590.04, Subd.3. In order to establish ineffective assistance of counsel petitioner must establish that his attorney's representation (1) fell below an objective standard of reasonableness and (2) a reasonable probability exists that but for trial counsel's unprofessional errors the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner has failed to meet his burden in this regard.

In State v. Olsen, 258 N.W. 2d 898 (1977) the Court held that the trial court trust inquire when a potential conflict exists. The Rules of Professional Responsibility state:

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or *a substantially related matter* in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose

> interests were materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to this matter.

Rules of Professional Responsibility 1.10(b) (emphasis added). An exception to the general rule exists if the client consents after consultation. *See* Rules 1.7, 1.8, 1.9. Representation to obtain a divorce decree of a victim's mother, of which representation by a partner had nearly expired, is not ***substantially related*** to a criminal sexual conduct charge. There was no evidence that representation by Mr. Thurston was actually invoked beyond the initial divorce decree in May. There is no significant factual dispute with respect to the conflict of interest issue. Petitioner made his first appearance in Hennepin County District Court on April 28, 1993. He was represented thereafter by Mr. Redburn. There was no evidence presented that Mr. Thurston was *in any way* involved in the defense of petitioner, or that Mr. Redburn was *in any way* involved in the dissolution of the marriage of Mr. Robinson.

During petitioner's trial The Honorable Michael Davis, the sitting trial court judge, brought both counsel in to chambers to discuss the potential conflict of interest raised by attorney Redburn. The transcript reveals that the discourse occurred as follows:

> THE COURT: We are on the record. We are in chambers, out of the hearing of the jury, and the defendant is not present. We can make a record in the courtroom with the defendant present but Counsel wanted to come back to chambers to alert me to a potential problem. Mr. Redburn.
> MR. REDBURN: The problem, Your Honor, is that apparently one of my partners has represented Ms.

> Kimberly Robinson, the victim's in this case, mother, he represented her in a divorce action.
> MR. APPLEBY: That's what the victim's mother informed me your honor, a divorce action. She told me it was three or maybe more years ago that the divorce was completed.
> MR. REDBURN: One of my partners apparently represented the victim's mother in a divorce action approximately three years ago but the action has been complete.
> THE COURT: Does anyone see any potential conflict here?
> MR.APPLEBY: The state does not, your honor.
> MR.REDBURN: I do not, no. I just wanted to bring it to the Court's attention.

Trial Tr. 27-28. Based upon those discussions, held on the record, the Court held that no constitutionally impermissible conflict of interest existed. Trial Tr. 28-29.

Judge Davis made specific findings that:

> If defendant was not informed his counsel's partner represented the victim's mother, such representation does not create a conflict of interest that prejudiced the defendant's substantial right to a fair trial. In Burger v. Kemp, 107 S.Ct. 3114, 3120 (1987), the Court held that a conflict of interest is prejudicial 'only if the defendant demonstrates that counsel actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance." (citations omitted) . . .In this case, (petitioner's trial counsel) was not associated in the victim's mother's divorce case, nor was his partner, Mr. Thurston, involved in the defense of the defendant. The divorce decree was entered into over two months prior to the commencement of trial.

> Based on these facts, no conflict of interest exists that deprived defendant of his Sixth Amendment right to counsel.

Order, dated September 30, 1993. *See also* Sent. Tr. at 21.

Petitioner's absence from the in chambers discussion does not merit automatic reversal. In State v. Bouwman, 354 N.W. 2d 1,8 (1984) the Court addressed the issue of whether a defendant's absence from in chambers discussion of an acquittal motion violated defendant's Sixth Amendment right to a fair trial. The court held that defendant's absence was harmless error, and reasoned that "In the instant case, the evidence of Bouwman's guilt is overwhelming and we are satisfied that his absence from the in-chambers conference did not prejudice his case." Id. The Court continued that "[f]urther support for this holding is provided by the numerous cases that provide that the right of the defendant to be present does not extend to in chambers discussions on questions of law." Id. *See* State v. Holmes, 374 N. W.2d 457 (Minn. App. 1985). Petitioner's conflict of interest claim is a question of law. Thus, it was harmless error for the petitioner not to be present.

In retrospect a record of the petitioner being informed of the potential conflict of interest and Judge Davis' decision should have been made. Having said that, it has been held that a petitioner's absence from the courtroom during closing arguments was harmless error State v. Delcastillo, 411 N.W. 2d 602 (Minn. App. 1987). Even if a petitioner has been denied the right to be present at the polling of the jury after the return of the verdict, the petitioner is not entitled to relief if it can be said that the error was harmless beyond a reasonable doubt. State v. Ware, 498 N.W. 2d 454, 457-458 (Minn. 1993).

Assuming arguendo that Mr. Redburn did indeed have a conflict of interest that was far more serious than Judge Davis' characterization, that fact alone would not warrant the

granting of a new trial. In State v. Smith, 464 N.W. 2d 730 (Minn. App. 1991), *aff'd* 476 N.W. 2d 511 (1991), the Minnesota Court of Appeals held that an attorney under suspension during the trial of his client did not deny that client effective Assistance of counsel. This Court finds that if a *suspended* lawyer rendered effective assistance, Mr. Redburn certainly did as well.

The defense did not offer any evidence that the petitioner would have objected to Mr. Redburn's continued representation due to the potential conflict had the petitioner been a part of the in chambers discussion. Petitioner has failed to even suggest how he might have been prejudiced or harmed by the potential conflict. In fact, Ms. Robinson, mother of the victim, testified at the post-conviction proceeding that "Because my contact with the firm had been so very limited, [the potential conflict] wasn't a real concern of mine." Post-Conv. Tran. at 18. She continued that Mr. Redburn had "absolutely nothing" to do with her marriage dissolution, and that she never had any professional contact with Mr. Redburn. Id. at 18, 20. The legal profession needs to be concerned about conflicts of interest. The ability of clients to have faith in the commitment and diligence of lawyers on behalf of their client to advocate to the best of their ability is premised upon the professional commitment to a set of values reflected in the Code of Professional Responsibility. However, in the context of the facts of this case it cannot be reasonably stated that petitioner's claim of deprivation of his Sixth Amendment rights due to his counsel's unconstitutional conflict of interest is well founded.

Petitioner next claims that he was denied effective assistance of counsel in that he was only provided interpretive services at approximately one-third of the attorney-client meetings. This is, in this Court's judgment, a far more troublesome issue. However, petitioner has again failed to meet the burden established in Strickland v. Washington, 466 U.S. 668 (1984). Petitioner demonstrated that his attorney's

conduct fell below an objective standard of reasonableness in that counsel failed to comply with the provisions of the ADA requiring the presence of an interpreter. However, petitioner has failed to demonstrate that a reasonable probability exists that but for trial counsel's unprofessional errors the result of the trial would have been different.

Courts have long held that deaf persons have a right to communicate through an interpreter in court proceedings. *See* State v. Howard, 118 Mo. 127, 24 S.W. 41 (1893); State v. Smith, 203 Mo. 695, 102 S.W. 526 (1907); Kley v. Abel, 483 S.W. 2d 625, 627 (1972). The legislature of the State of Minnesota has declared "that the constitutional rights of persons handicapped in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings." Minn.Stat. 611.30. A person *handicapped in communication* is defined as a person who "(a) because of a hearing, speech or other communication disorder, or (b) because of difficulty in speaking or comprehending the English language, cannot fully understand the proceedings or any charges made against the person, or is incapable of presenting or assisting in the presentation of a defense." Minn. Stat. 611.31.

The Minnesota legislature has mandated that persons with hearing impairments are to be provided interpretive services at every stage of criminal procedure. Specifically, once a person handicapped in communication is apprehended or arrested, the arresting officer shall immediately "make necessary contacts to obtain a qualified interpreter and shall obtain an interpreter at the earliest possible time at the place of detention." Minn. Stat. 611.32, Subd.2. With the assistance of the interpreter the law enforcement officer shall explain to the person handicapped in communication all charges filed against them and all procedures relative to their detainment and release. Id. The interpreter is also to assist the person with all other communications. Id. The person with a communication disability must have a qualified

interpreter available to them prior to their interrogation or taking of their statement. Id. Interpreters are to be appointed in any "proceedings in which a person handicapped in communication may be subjected to confinement or criminal sanction, or any proceeding preliminary to that proceeding." Minn. Stat. 611.32. If a defendant is handicapped in communication, a qualified interpreter for that defendant shall be present with the defendant at his or her arraignment, at the time of the plea, and at every stage of the trial. Minn.R. Crim.P. 26.03, Subd.1. The Rules also provide that before a probationer appears before the court pursuant to an arrest and detention order concerning an alleged probation violation, the court must "determine whether the probationer is handicapped in communication, and, if so, appoint a qualified interpreter to assist the probationer throughout the probation violation proceedings."
Minn.R.Crim.Proc. 27.04, Subd.2 (1). If an attorney cannot afford the expenses of an interpreter, he or she may petition the Court for payment of the services. Minn. Stat. 611.21. Thus, the Minnesota legislature has made it imminently clear that the rights of defendants who are hearing impaired must be protected. Such rights include interpretive assistance to enable a hearing impaired defendant to fully participate in his or her defense.

Congress has reacted to the needs of deaf individuals as well. The Americans With Disabilities Act (ADA) was enacted in 1990 to address the unmet needs of persons with disabilities. The Congressional findings specifically stated that although forty-three million Americans have some form of disability, and this number is increasing, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C.S. section 1201(a)(2). In order to eradicate these problems, the

Act prohibited discrimination in employment, public services and public accommodations.

Title III, the Public Accommodation portion of the ADA, prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C.S. 12182(a). In order to make out a prima facie case under Title III a plaintiff must establish that (1) he or she has a disability (2) that defendant's office is a place of public accommodation and (3) that he or she was discriminated against by being refused full and equal enjoyment of legal assistance because of his or her disability.

Certain private entities are considered public accommodations for purposes of the Act; "a Laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, *office of an accountant or lawyer,* pharmacy, insurance office, professional office of a health care provider, hospital or other establishment." 42 U.S.C.S. 12181(7)(F). The Act prohibits discrimination in many forms, but specifically in the failure to provide auxiliary aids and services to persons with disabilities, unless it can be shown that to do so would fundamentally alter the nature of the service that to do so would result in undue burden. 42 U.S.C.S. 12182(b)(2)(iii). The term "Auxiliary aids and services" includes "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments." Id. at 12102(1)(A). Under the Americans with Disabilities Act attorneys have the responsibility of providing an interpreter, or some form of auxiliary aid, when their client is hearing impaired or deaf.

Remedies for violations of the Public Accommodation portion of the ADA include injunctive relief. 42 USCS 12188(a)(2). The Act states that:

> ...injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of an auxiliary aid or service . . ." Id.

Thus, it is appropriate that this court order that in all private meetings between an attorney and a client who is deaf, an interpreter shall be provided.

The ADA was established to protect persons with disabilities, a group of which the petitioner is a member. Violation of a statute which imposes a standard of conduct designed to protect the party injured is negligence per se unless the statute establishes that breach is only prima facie evidence of negligence. Butler v. Angel, 243 Minn. 317, 322, 68 N.W. 2d 226, 230 (1954). See also Siem v. Garavalia, 306 N.W. 2d 806, 810 (1981); Anderson v. First Bank National Association, 1996 WL 291438 (Minn. App.).

Although there are no reported decisions applying the ADA to criminal defense attorneys, doctors labor under identical standards as attorneys under the ADA. In Mayberry v. VonValtier, 843 F. Supp. 1160 (1994) a deaf patient sued her physician for discrimination in the failure to provide interpretive services for their appointments. The Court held that there was enough evidence to survive summary judgment on her claim of disability discrimination. Id. at 1167. This Court believes that trial counsel should have arranged for an interpreter to be present for all client interviews and could have sought funding for that purpose from the Court. However, the "fault" may also lie with the Sheriff's office. In New York state, a series of deaf and hearing impaired inmates sued the New York State Department of Correctional Services and several individuals associated therewith. The deaf and

hearing impaired inmates claimed that petitioners' failure to accommodate plaintiff's hearing impairments violated the Rehabilitation Act, Americans with Disabilities Act, due process and the Eighth Amendment. Plaintiff's were granted summary judgment and the court held that defendants' failure violated all statutes and constitutional provisions under which plaintiffs sought relief, and awarded declaratory or injunctive relief. Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995).

The Minnesota Human Rights Act (MHRA) utilizes nearly identical language to the ADA. The MHRA prohibits discrimination in the denial of full and equal enjoyment of goods and services of a place of public accommodation because of disability. Minn. Stat. 363.03(1). A series of factors then aid in the determination of a reasonable accommodation. Minn. Stat. 363.03(2)(a)-(f). A place of public accommodation is defined as a "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public." Minn. Stat. 363.01, Subd.33. An office of an attorney is within this definition.

The Minnesota Court of Appeals has limited this strong legislative commitment and declared that persons with disabilities are not guaranteed unqualified access to interpreters at every phase of criminal and/or civil litigation. The Court of Appeals has held that failing to provide a deaf driver with an interpreter at the scene of the accident or at the police station did not require reinstatement of driver's license when the officers could communicate in writing with the driver. Warner v. Commissioner of Public Safety, 498 N.W. 2d 285 (Minn. App. 1993). The Court held that while "making an interpreter available is desirable, it should not interfere with the evidence gathering purposes of the implied consent law." Id. at 288, *citing* Yokoyama v. Commissioner

of Public Safety, 356 N.W. 2d 830, 831 (Minn. App. 1984). In addition, it has been held that inaccurate translations are harmless error. State v. Her, 510 N.W. 2d 218 (1994); *See also* State v. Lee, 494 N.W. 2d 475 (Minn. 1992); State v. Mitjans, 408 N.W. 2d 824 (1987).

A defendant must be afforded the opportunity to meaningfully participate in his or her own defense. To the extent that the petitioner's hearing impairment prevented his participation in his own defense the question of his competence is raised. State v. Dighera, 617 S.W.2d 524 (Mo.App.1981). The capacity of a witness to observe, remember and communicate goes to the question of competency. All questions of competence are to be decided preliminary by the Court alone. Minnesota Rules of Criminal Procedure provide that "A defendant shall cot be permitted to enter a plea or be tried or sentenced for any offense if the defendant (1) lacks sufficient ability to consult with a reasonable degree of rational understanding with defense counsel." Minn. R. Crim. Proc. 20.01, Subd.1. The burden of proof lies with the defendant to establish incompetence by the preponderance of evidence. Cooper v. Oklahoma, 1996 WL 174481 (U.S.).

The problem remains that whether approached from an ADA standpoint, or a MHRA standpoint, or a competency standpoint or a procedural due process standpoint, the outcome always remains the same; while petitioner has demonstrated that his trial counsel may well have fallen below an objective standard of reasonableness, he has failed to demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 691 (1984).

This Court is not prepared to use this case to attempt to create new law in the State of Minnesota, albeit the proposition that clearer standards for the provision of qualified interpreters for the deaf may be appropriate. Even

in those cases where the Minnesota Supreme Court has used its inherent authority to mandate standards to improve the integrity of the criminal process the Court has tended to be prospective. *See* State v. Scales, 518 N.W. 2d 587 (Minn. 1994). If this Court had credible evidence that petitioner did not understand his trial counsel the result surely would be different. Dr. Rose only testified that the attempts at written communication between petitioner and his trial counsel *could have* lead to misunderstandings between the petitioner and his counsel, and that later meetings with the assistance of an interpreter *may not have* cleared up the possible misunderstandings. The Court simply has no credible evidence that petitioner did have misunderstandings with his attorney by virtue of the lack of interpreter and that the subsequent use of an interpreter did not clarify those understandings. There is no evidence that but for the lack of interpretive services at two-thirds of the attorney client meetings, the trial would have come out the other way.

There was overwhelming evidence at trial against the petitioner. Judge Davis commented at sentencing:

> The crux of the matter here is the State had a powerful case against you. The victim in this matter was very credible. And I say that again, was very credible... This case calls for a departure, for the maximum and for consecutive sentences. I will file a written memorandum outlining the reasons for departure, but for the oral record, make no mistake about it, a twelve year old girl was abducted at knife point. She was dragged into a wooded area, cotton gauze was forced into her mouth. Her mouth was then taped shut with electrical tape. You tied her up with wire, and then removed her pants. You then proceeded to penetrate her vagina with your penis, your fingers and your tongue. Thereafter, you removed the tape and the gauze from the victim's mouth and forced her to perform oral sex and then kiss you after that

was done. The jury heard this evidence and found you guilty. Certainly, under those fact situation there, the case calls for the maximum departure."

Sent. Tran. at 47-48. The Court then outlined that the departure was based on the young age of the victim, the treatment of the victim with particular cruelty, the scheming and planning of the crime, the course of conduct and the petitioner's prior conviction for criminal sexual conduct. Id. In the Court's September 30, 1993 Order outlining the reasons for departure the Court added "Viewed in their totality, the numerous aggravating factors present in this case support an upward departure in this case. By his actions, the defendant has taken something from the victim that can never be replaced, the innocence of childhood." See Order, page 7.

The petitioner has failed to demonstrate that but for the failure to provide interpretive services, there was a reasonable probability that the outcome would have been different. Thus, petitioner's motion for post conviction relief is **DENIED.**